

(22,878)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 104.

THE GEORGE N. PIERCE COMPANY, PETITIONER,

vs.

WELLS FARGO & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print
Caption	a	1
Transcript of record from the circuit court of the United States for the western district of New York.....	1	1
Summons.....	1	1
Complaint.....	3	2
Answer.....	8	5
Order dismissing summons.....	16	9
Clerk's minutes of trial, &c.....	18	10
Judgment.....	20	11
Bill of exceptions.....	22	12
Stipulation of facts.....	23	12
Exhibit "A"—Express receipt.....	24	13
Testimony of George R. Hochreiter.....	27	15
James Berry.....	45	26
William Tomlin.....	54	31
Harry Burge.....	57	32
George Berry.....	61	35
Samuel Vanderpool.....	70	40
August Hanks.....	74	42
Noah Burnette.....	78	45

	Original.	Print
Motion to strike out denied.....	81	46
Defendant rests.....	81	46
Decision of court.....	81	47
Plaintiff's request to go to jury.....	85	49
Direction of verdict.....	87	50
Order settling bill of exceptions.....	88	50
Petition for writ of error.....	89	51
Assignment of errors.....	90	51
Bond.....	94	54
Writ of error.....	98	56
Citation.....	100	57
Order extending time to file transcript.....	101	57
Clerk's certificate.....	101	58
Opinion by Ward, J.....	102	58
Dissenting opinion by Noyes, J.....	109	62
Judgment.....	114	63
Clerk's certificate.....	116	68
Writ of certiorari.....	117	66
Stipulation as to return to writ of certiorari.....	120	67
Return to writ of certiorari.....	122	67

a United States Circuit Court of Appeals for the Second Circuit.

THE GEORGE N. PIERCE COMPANY, Plaintiff in Error (Plaintiff Below),

vs.

WELLS, FARGO & COMPANY, Defendant in Error (Defendant Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Western District of New York.

Printed under the direction of the clerk.

United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1911. William Parkin, Clerk.

1 United States Circuit Court for the Western District of New York.

No. 202.

THE GEORGE N. PIERCE COMPANY, Plaintiff,
against

WELLS, FARGO & COMPANY and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States of America, at the City of Buffalo, in said Western District of New York, this 2nd day of December, in the year of our Lord, one thousand nine hundred and seven.

[SEAL.]

HARRIS S. WILLIAMS, Clerk.

HOYT & SPRATT,
Plaintiff's Attorneys.

Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.

(Endorsed:) No. 202.—U. S. Circuit Court, Western District of New York.—The George N. Pierce Company vs. Wells, Fargo &

Company and The Atchison, Topeka & Santa Fe Railway Company.—Summons.—Hoyt & Spratt, Plaintiff's Attorneys.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Dec. 14, 1907.—Harris S. Williams, Clerk.

3 United States Circuit Court, Western District of New York.

THE GEORGE N. PIERCE COMPANY, Plaintiff,

vs.

WELLS, FARGO & COMPANY and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendants.

The plaintiff, by Hoyt & Spratt, its attorneys, for its complaint herein alleges:

I. That it is and at all times mentioned herein was a domestic corporation, organized and existing under and by virtue of the laws of the State of New York and no other; and upon information and belief, that the defendant, Wells, Fargo & Company, is and at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of Colorado and no other; and, upon information and belief, that the defendant, the Atchison, Topeka & Santa Fe Railroad Company is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kansas and no other; that the plaintiff has its office and principal place of business at the City of Buffalo within the Western District of the State of New York; that diversity of citizenship within the meaning of the statutes made and provided exists between the plaintiff and the defendants; that at all times herein mentioned the defendant,

4 Wells, Fargo & Company, maintained and now maintains an office and was and is located and doing business at the said City of Buffalo, and owned and owns property in the said City of Buffalo employed in its business as an express company common carrier of property for hire between the said City of Buffalo and other places, including San Francisco, California; that the defendant, the Atchison, Topeka & Santa Fe Railway Company was and is a common carrier owning, maintaining and operating a line of railroad extending from Chicago, in the State of Illinois, to San Francisco in the State of California.

II. That on or about the 3rd day of May, 1907, the plaintiff delivered to the defendant Wells, Fargo & Company the following described goods and chattels, which the said defendant undertook and agreed at said City of Buffalo, with the plaintiff, for a certain hire and reward, to transport safely as common carrier and to deliver to Crocker, Woolworth National Bank of San Francisco in said State of California at said City of San Francisco, to wit: (1) One 28-32 H. P. Pierce Great Arrow Automobile; (2) One Gabriel Horn; (3) One trunk; (4) One cape top for automobile; (5) One glass front for same; (6) One Warner Autometer; (7) One cotton cover for same; (8) One 28-32 H. P. Pierce Great Arrow Suburban automobile; (9) Two 4½" extra front wheels for same; (10) One cot-

ton cover for same; (11) One 28-32 H. P. Pierce Great Arrow Automobile; (12) One Warner Autometer; (13) One cotton cover for said automobile; (14) One semi-enclosed top for same; (15) One 28-32 H. P. Pierce Great Arrow automobile; (16) One cape top for same; (17) One cotton cover for same; (18) One "A" Body for 30 H. P. Car; (19) Two extra guards for same; (20) One cape top for automobile; (21) One glass front for automobile.

5 That the above described property was and is the property of the plaintiff. That on or about the 5th day of May, 1907, the said defendant delivered to the defendant, the Atchison, Topeka & Santa Fe Railway Company, the said property and said last named defendant received said property and did also and in addition to the defendant, Wells, Fargo & Company, undertake and agree with the plaintiff for a certain hire and reward to transport safely, as a common carrier, said property from Chicago, in the State of Illinois, to San Francisco, in the State of California. That both of the defendants failed and neglected to so carry the said property safely, and wholly failed to deliver the said property to the said Crocker, Woolworth National Bank of San Francisco, California, by reason whereof the plaintiff has wholly lost its said property, which was of the reasonable worth and value of Twenty thousand Dollars, to plaintiff's damage in the sum of Twenty thousand Dollars, with interest from the 3rd day of May, 1907.

III. For a further and separate cause of action, plaintiff realleging the foregoing allegations with the same force and effect as if the same were here repeated, alleges, on information and belief, that the defendants, their agents, servants and employes, on or about the 6th day of May, 1907, and at or near the Village of Norborne, in the State of Missouri, and while engaging in transporting the above described property in a railroad car in pursuance of the above alleged contract, did, by their carelessness, negligence, gross negligence and recklessness, caused the said property to be lost, damaged and destroyed, in that they carelessly and with gross negligence and recklessness caused said car with its contents to be derailed and become destroyed by fire, by reason whereof the plaintiff has wholly lost its said property to its damage in the sum of Twenty thousand Dollars.

6 with interest from the 3rd day of May, 1907; that said property was delivered to the defendants by the plaintiff, packed, covered and protected in a good and workmanlike manner, and that the loss, damage and destruction of said property were in no wise caused by the negligence of plaintiff, its servants, agents or employes.

IV. And for a separate cause of action, plaintiff realleging the foregoing allegations with the same force and effect as if they were here repeated, alleges that the defendant, Wells, Fargo & Company, at all times herein mentioned was and is an express company common carrier engaged in the transportation of property wholly by railroad from Buffalo in the State of New York to San Francisco, in the State of California; that the said defendant having received said property as aforesaid for transportation from a point in one city, to wit, Buffalo, N. Y., to a point in another city, to San Francisco,

California, in pursuance of the statute of the United States made and provided issued to the plaintiff a receipt or bill of lading therefor; that the plaintiff is the lawful holder of the said receipt or bill of lading; on information and belief that on or about the 6th day of May, 1907, said property was by said defendants, its agents or servants, or by the defendant, the Atchison, Topeka & Santa Fe Railway Company, a railroad common carrier, to which defendant, Wells, Fargo & Company delivered said property and over whose line such property was passing, said railroad defendant being the agent for such transportation of the defendant, Wells, Fargo & Company, caused to be lost, damaged and injured at or near Norborne, Missouri, as aforesaid, whereby the plaintiff has wholly lost said property, to its damage in the sum aforesaid.

V. Plaintiff further alleges that it has duly demanded from the defendants the payment to it of the damage suffered by it as aforesaid and has given the defendant, Wells, Fargo & Company, due and timely notice of its claim therefor.

Wherefore plaintiff demands judgment against the defendants for Twenty Thousand Dollars, with interest from the 3rd day of May, 1907, together with the costs of this action.

HOYT & SPRATT,
*Attorneys for Plaintiff, 77 West
Eagle St., Buffalo, N. Y.*

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Charles Clifton, being duly sworn, deposes and says, that he is an officer of the above named plaintiff, to wit, the Treasurer thereof; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES CLIFTON.

Subscribed and sworn to before me this 30th day of November, 1907.

WILLIAM J. THOMPSON,
Notary Public, Erie County.

(Endorsed:) U. S. Circuit Court, W. D. of New York. The George N. Pierce Company vs. Wells, Fargo & Company & One.—Complaint.—Hoyt & Spratt, Attorneys for Plaintiff.—Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Dec. 2, 1907.—Harris S. Williams, Clerk.

8 United States Circuit Court, Western District of New York.

THE GEORGE N. PIERCE COMPANY, Plaintiff,
against
WELLS-FARGO & COMPANY, Defendant.

The defendant, by Kenefick, Cooke & Mitchell, its attorneys, for answer to the first cause of action set forth in the plaintiff's complaint:

First.

Answering the allegations contained in paragraph II of the complaint this defendant admits that heretofore and on or about the 3d day of May, 1907, plaintiff delivered to defendant certain property consigned to Crocker-Woolworth National Bank of San Francisco, under the terms of a partly written and partly printed shipping receipt or bill of lading expressing the terms and conditions of the agreement under which defendant undertook to handle the same, and not otherwise, for the terms and conditions of which defendant begs leave to refer to the original of said shipping receipt or bill of lading or a true copy thereof when it shall be produced upon the trial of this action, and defendant denies that the terms and conditions of said agreement are correctly set forth in said complaint; and this defendant denies knowledge or information sufficient to form a belief as to whether said property was the same property designated in the complaint or any such property, and this defendant has not knowledge or information sufficient to form a belief as to whether the plaintiff is or ever was the owner of said property or whether said property was reasonably worth the sum of Twenty thousand dollars (\$20,000), or any other sum, or whether the plaintiff was damaged in that, or in any other sum.

9 The plaintiff also denies any knowledge, or information sufficient to form a belief, as to whether the Atchison, Topeka & Santa Fe Railway Company agreed with the plaintiff to transport the property described in this complaint safely, as a common carrier, from Chicago, Illinois, to San Francisco, California.

Second.

And the defendant, by its said attorneys, answering the second and separate cause of action set forth in the plaintiff's complaint:

I. Repeats the denials hereinabove set forth with the same force and effect as if the same were herein set out.

II. Denies any knowledge, or information sufficient to form a belief, as to whether the goods, chattels and property described in the complaint were destroyed by fire or wholly lost, and whether plaintiff suffered damage thereby in the sum of Twenty thousand dollars (\$20,000), or any other sum.

Also, denies any knowledge, or information sufficient to form a belief, as to whether the property described in the complaint was

delivered to the defendants by the plaintiff, packed, covered and protected in a good and workmanlike manner.

Also, denies any knowledge, or information sufficient to form a belief, as to whether the loss and destruction of said property were in anywise caused by the negligence of the plaintiff, its agents, servants or employees.

III. Denies, upon information and belief, each and every allegation set out in said second cause of action in plaintiff's complaint, not otherwise herein denied.

Third.

The defendant, by its said attorneys, for a separate answer and defense to the third cause of action set forth in the plaintiff's complaint:

I. Repeats the denials hereinbefore set forth with the same force and effect as if the same were herein set out.

II. Denies any knowledge, or information sufficient to form a belief, as to whether the defendant received the property described in the complaint, and as to whether the said property described in the complaint was delivered by the defendant to the Atchison, Topeka & Santa Fe Railway Company, and as to whether the property described in the complaint was lost, damaged or injured, and as to whether the plaintiff suffered damage thereby in the sum of Twenty thousand dollars (\$20,000), or any other sum.

III. Admits that the defendant issued to the plaintiff a shipping receipt or bill of lading, as set out in the first defense herein, but denies any knowledge, or information sufficient to form a belief, as to whether the property described in the complaint is the same property described in said shipping receipt or bill of lading, and also

denies any knowledge, or information sufficient to form a belief, as to whether the plaintiff is the lawful holder of said shipping receipt or bill of lading.

The defendant also denies, upon information and belief, that the said Atchison, Topeka & Santa Fe Railway Company was the agent of the defendant for the transportation of the property described in the complaint, or of the property covered by said shipping receipt or bill of lading.

Fourth.

For a further and separate answer and defense to each and every of the causes of action set forth in the plaintiff's complaint, the defendant alleges:

That on or about the third day of May, 1907, plaintiff delivered to defendant certain property consigned to the Crocker-Woolworth National Bank of San Francisco, under the terms of a partly written and partly printed shipping receipt or bill of lading expressing the terms and conditions of the agreement under which defendant undertook to handle the same, and not otherwise, for the terms and conditions of which defendant begs leave to refer to the original of said shipping receipt or bill of lading, or a true copy thereof, when it shall be produced upon the trial of this action, and which property

was described in said shipping receipt or bill of lading and which property, the plaintiff is informed and believes, is claimed by the plaintiff to be the same property described in the complaint.

The defendant further alleges that under the terms and conditions of the said receipt or bill of lading the liability of the defendant is only that of a forwarder and that likewise, under the terms and conditions of said receipt or bill of lading, the defendant is not

12 liable for any loss or damage to the said goods and chattels unless said loss or damage shall prove to have been caused by or to have resulted from the fraud or gross negligence of this defendant or its servants. And the defendant alleges that in forwarding and transporting said goods and chattels this defendant, its servants, exercised reasonable care in protecting said goods and chattels from loss or damage and was not guilty of any fraud or gross negligence whereby any loss or damage was occasioned to said property.

And the defendant further alleges that said railway company, in transporting the said property over its line of railroad, exercised due care for the protection of said property, and that the loss and destruction of said property was not due in any wise to any lack of care on the part of the said railroad company, and said railroad company was not guilty of any fraud or gross negligence whereby any loss or damage was occasioned to said property.

That the said receipt or bill of lading embodies the contract entered into between the plaintiff and the defendant for the shipment of said goods or chattels.

Fifth.

Further answering the complaint and for a separate and distinct partial defense to each and every of the causes of action set forth therein, this defendant further avers and alleges, upon information and belief:

That if the property referred to in the complaint was ever delivered to the defendant and handled by it, it was delivered to and handled by it under the terms of a partly written and partly printed shipping receipt or bill of lading expressing the terms and conditions under which defendant undertook to handle the said shipment, and not

13 otherwise, for the terms and conditions of which defendant begs leave to refer to the original or a true copy thereof when it shall be produced upon the trial of this action. That among the terms and conditions of said receipt was the following:

"That liability of Wells, Fargo & Co. shall be at all times only that of a forwarder and in no event shall it be liable for loss of or damage to said property * * * for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said Company or its servants; nor in any event shall said Company be held liable beyond the sum of fifty dollars, at not exceeding which sum the said property is hereby valued, unless a different value is herein above stated:

That no greater or other value was stated therein and that in no event can plaintiff recover from defendant more than fifty dollars (\$50).

Sixth.

Further answering the complaint and for a separate and distinct partial defense to each and every of the alleged causes of action therein set forth, this defendant further avers and alleges, upon information and belief:

That at the time said property was delivered to defendant, if in fact it ever was delivered to defendant, plaintiff omitted to declare to defendant the true value thereof, but procured defendant to transport said property upon the basis of a valuation of fifty dollars at a lower rate than said property would have been transported had the true value been declared to and known by defendant, and that plaintiff is estopped from claiming a greater value therefor than fifty dollars, and that in no event can plaintiff recover from defendant more than Fifty dollars (\$50).

Wherefore, defendant demands a dismissal of the plaintiff's complaint, with costs, or, in the event that the defendant is held liable, that its liability be fixed and determined at the sum of Fifty dollars (\$50), with costs.

KENEFICK, COOKE & MITCHELL,

Attorneys for Defendant,
558 Ellicott Square, Buffalo, N. Y.

SOUTHERN DISTRICT OF NEW YORK,

State of New York, County of New York, ss:

A. W. Zimmermann, being duly sworn, deposes and says that he is an officer, to wit, the Secretary, of Wells, Fargo & Company, the defendant in the above entitled action; that he has read the foregoing answer, and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason why this verification was not made by defendant is that said defendant is a foreign corporation.

That the sources of deponent's information and the grounds of his belief as to all the matters not therein stated to be alleged of his own knowledge are the books, records and papers of the defendant, statements made to deponent by other officers and agents of the defendant, besides his own knowledge as such Secretary.

A. W. ZIMMERMANN,
Secretary.

Sworn to before me this 7th day of October, 1908.

WM. F. COLLINS,
Notary Public in and for — Co., N. Y.

My commission expires March, 1910.

(Endorsed:) United States Circuit Court, Western District of N. Y. George N. Pierce Co. vs. Wells-Fargo Co. Answer. Kenefick, Cooke & Mitchell, Attorneys for defendant. Office and Post Office Address, 558 Ellicott Square, Buffalo, N. Y. U. S. Circuit Court, Western Dist. of N. Y. Filed Oct. 8, 1908. Harris S. Williams, Clerk. Timely service of the within answer is hereby admitted this 8th day of October, 1908, Hoyt & Spratt, Attorneys for Plff.

16 At a Term of the United States Circuit Court, Held in and for the Western District of New York, at the Federal Building, in the City of Buffalo, N. Y., on the 23rd day of July, 1908.

Present—Hon. John R. Hazel, Circuit Judge.

United States Circuit Court for the Western District of New York.

THE GEORGE N. PIERCE COMPANY, Plaintiff,
against

WELLS, FARGO & Co., and ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Defendants.

An order to show cause having been heretofore and on or about the 23rd day of December, 1907, duly granted herein requiring the plaintiff to show cause why the alleged service of the summons and complaint on the defendant Atchison, Topeka & Santa Fe Railway Company herein should not be vacated, quashed and set aside and this action dismissed as to the said defendant Atchison, Topeka & Santa Fe Railway Company, and the return day of the said order to show cause having been duly adjourned from time to time, and an order having been granted on or about the second day of May, 1908, on motion of the plaintiff, for the examination of Edgar W. Demarest, the commercial agent of said defendant Atchison, Topeka & Santa Fe Railway Company, upon whom the summons and complaint herein was served, and said examination having been had before a Special Master of this court, Harris S. Williams, on the 17th day of May, 1908, and said Special Master having duly certified the evidence so taken to this court, and thereafter said order to show cause having duly come on to be heard.

Now, upon reading and filing said order to show cause granted on the 23d day of December, 1907, and the affidavits of Edgar W. Demarest and Daniel J. Kenefick, duly verified on the 23d day of December, 1907, the stenographer's minutes of the testimony so taken as aforesaid before the Special Master on the 17th day of June, 1908, and after hearing Daniel J. Kenefick, Esq., and Edward H. Letchworth, Esq., of Counsel for the Defendant Atchison, Topeka & Santa Fe Railway Company, in support of said motion, and Alfred L. Becker, of Counsel for the plaintiff, in opposition thereto, and due deliberation having been had thereon.

Now, upon motion of Kenefick, Cooke & Mitchell, appearing specially on behalf of the defendant Atchison, Topeka & Santa Fe

Railway Company, for the sole and only purpose of objecting to the jurisdiction of this court,

It is hereby ordered that the service of the summons and complaint herein upon the said defendant Atchison, Topeka & Santa Fe Railway Company be, and the same hereby is, vacated, quashed and set aside, and it is further ordered that this action be, and the same hereby is, dismissed as to the defendant Atchison, Topeka & Santa Fe Railway Company.

JOHN R. HAZEL, *U. S. J.*

(Endorsed:) U. S. Circuit Court, Western Dist. of N. Y. The George N. Pierce Company vs. Wells, Fargo & Co. and one. Order. Kenefick, Cooke & Mitchell, Attorneys for Deft. Ry. Co., Office and Post-Office Address, 558 Ellicott Square, Buffalo, N. Y. U. S. Circuit Court, Western Dist. of N. Y. Filed Jul. 24, 1908. Harris S. Williams, Clerk.

18 At a Stated Session of the Circuit Court of the United States for the Western District of New York, held at the Federal Building in the City of Rochester, N. Y., on the 31st day of May, 1910.

Present—Hon. George C. Holt, United States Judge.

THE GEORGE N. PIERCE COMPANY, Plaintiff,
against
WELLS FARGO & COMPANY, Defendant.

For plaintiff, Hoyt & Spratt, William B. Hoyt, Alfred L. Becker.
For defendant, Kenefick, Cooke & Mitchell, Daniel J. Kenefick, Ralph Prime.

Case moved by plaintiff's attorneys.

Ordered that a jury be empanelled herein and that the trial of this action do now proceed.

Whereupon the following jurors were called and sworn: Chauncey G. Starkweather, Burton Quimby, B. C. Eaton, Egbert N. Coy, Joshua Lascelle, Edward J. Welch, Melville C. Burritt, Wm. Ancomb, Geo. W. Elliott, John Tennison, Jr., John Atwater, Gleason Wilcox.

The Court is here adjourned till to-morrow morning at 10 o'clock.

19

WEDNESDAY, *June 1st, 1910.*

The Court met pursuant to adjournment.

Present—Hon. George C. Holt, U. S. Judge.

Same appearances.

Trial resumed.

Stipulation of facts read.

Plaintiff's witnesses: George R. Hochreiter.
 Deposition of James Berry read in evidence.
 Deposition of William Tomlin read in evidence.
 Deposition of Harry Burge read in evidence.
 Recess until 2 P. M.

2 p. m.

Present as before.

Same appearances.

Trial resumed.

Plaintiff's witnesses:

Deposition of George Berry read in evidence.

Deposition of Samuel Vanderpool read in evidence.

Deposition of August Henks read in evidence.

Deposition of Noah Burnett read in evidence.

Plaintiff here rests.

Defendant here rests.

Defendant's counsel here moves for a direction of a verdict.

Plaintiff's counsel asks to go to the jury.

Plaintiff's motion denied and exception.

The jury is here directed to bring in a verdict for the plaintiff for \$50.00.

Exception to plaintiff.

Whereupon the jury bring in a verdict for the plaintiff for \$50.00.

Stay of all proceedings granted for three months after entry of judgment and plaintiff given three months to make and file Bill of Exceptions.

Attest:

HARRIS S. WILLIAMS, *Clerk*.

20 At a Term of the United States Circuit Court, held in and for the Western District of New York, at the Federal Building in the City of Rochester, on the 1st day of June, 1910.

Present—Honorable George C. Holt, Circuit Judge.

United States Circuit Court, Western District of New York.

THE GEORGE N. PIERCE COMPANY, Plaintiff,

WELLS-FARGO & COMPANY and One, Defendants.

The issues in this action having been duly brought on for trial before Judge George C. Holt and a jury, at a Trial Term of this Court, held on the 31 day of May, 1910, at the Federal Building in the City of Rochester, County of Monroe, Western District of New York, and the plaintiff appearing by Hoyt & Spratt, its attorneys, William B. Hoyt and Alfred L. Becker, of counsel, and the defendant Wells-Fargo & Company appearing by Kenefick, Cooke, Mitchell & Bass, its attorneys, Daniel J. Kenefick and William C. Prime, of counsel, and the issues having been tried and a verdict for the plaintiff directed by the Court having been rendered on the 1st day of June, 1910, for the sum of Fifty

21

Dollars (\$50.00) and the costs of the said plaintiff having been duly adjusted at Seventy-five and 55/100 Dollars (\$75.55),

Now, therefore, it is adjudged that the plaintiff The George N. Pierce Company recover of the defendant Wells Fargo & Company the sum of Fifty Dollars (\$50.00) damages, together with interest from May 7, 1907, amounting to \$10.00, and Seventy-five and 55/100 Dollars (\$75.55) costs, amounting in all to One hundred thirty-five and 55/100 Dollars (\$135.55) and have execution accordingly.

Filed, docketed and entered Judgment this 30th day of August, 1910, at 10:50 a. m.

HARRIS S. WILLIAMS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Western District of N. Y.—The George N. Pierce Company, Plaintiff, vs. Wells Fargo & Company and one, Defendants.—Judgment.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Aug. 30, 1910.—Harris S. Williams, Clerk.

22 Circuit Court of the United States for the Western District of New York.

GEORGE N. PIERCE COMPANY, Plaintiff.

vs.

WELLS, FARGO & COMPANY, Defendants.

And now comes the above named plaintiff, by Hoyt & Spratt, its attorneys, and tenders the following as its bill of exceptions.

Tried at the May Term of the United States Circuit Court, 1910, held at the United States Court House, Rochester, N. Y. commencing May 31, 1910, before Hon. George C. Holt, U. S. District Judge, duly assigned to hold such term, and a jury.

Appearances:

Hoyt & Spratt, William B. Hoyt, Alfred L. Becker, of Counsel for Plaintiff.

Kenefick, Cooke, Mitchell & Bass, Daniel J. Kenefick, W. C. Prime, of Counsel for Defendants.

JUNE 1, 1900.

(Jury sworn.)

Mr. Becker then read the following stipulation:

It is stipulated between the parties hereto for the purposes of the trial of the above entitled case that on the 3d day of May, 1907, at Buffalo, N. Y., the plaintiff delivered to the defendant certain personal property described in Exhibit "A," to be delivered to the Crocker-Woolworth National Bank at San Francisco, Cal., and at the same time defendant issued and delivered to plaintiff a partly written and partly printed shipping receipt, which

is hereto annexed and marked Exhibit "A," and which said shipping receipt plaintiff will offer in evidence.

Said receipt is received in evidence and marked Plaintiff's Exhibit "A."

Plaintiff, however, in offering the said receipt in evidence reserves the right to contend and offer evidence to show that at the time of said transaction no request was made, or refused, to declare a value, and plaintiff also reserves the right to contend that some part or parts of said receipt are void, as prohibited by the interstate commerce law and by common law.

It is also stipulated, subject to defendants' objection to the competency, relevancy or materiality of any testimony of value of said property in excess of \$50.00, that the said property was at the time it was delivered to the defendant actually worth the sum of \$15,487.06, and defendant, subject to its objection to the competency, relevancy or materiality of said testimony, concedes that at the time of delivery of said property to it, the said property was obviously of a value in excess of \$50.00 and that it knew that same was of a value largely in excess of a thousand dollars—

Judge KENEFICK: Just a moment. If the Court please, if that testimony is received, we will want to also reserve our exception.

The COURT: Very well.

Mr. BECKER (reading): It is also stipulated that the plaintiff was the owner of said property at the time of its delivery to the defendant and is the sole owner of any cause of action against defendant arising out of the delivery thereof to defendant.

It is also stipulated that at the time the said property was delivered to defendant, and said shipping receipt, Exhibit "A," delivered to plaintiff, plaintiff had in his possession and had had in his possession since July 7, 1906, a book, produced by plaintiff, marked Exhibit 1 for identification, from which said Exhibit "A" was detached, and that the entries on each of the pages now in said book, excepting the names in the last column on each page, were made in the handwriting of plaintiff's servants and represents shipments of matter by express by plaintiff on defendant's lines, and that the names in the last column on each page of said book are in the handwriting of a servant of the defendant.

Mr. HOYT: The shipping receipt has been handed up to the Court and under the stipulations and reservations contained it is also offered in evidence and marked Exhibit "A."

EXHIBIT "A."

JUNE 1, 1910.

Duplicate.

Not Negotiable.

Wells Fargo & Co. Express.

Read the conditions of this receipt.

Received from Geo. N. Pierce Co., the following articles which Wells Fargo & Co., a corporation, hereby undertakes to forward to

its agency nearest destination, but only upon the following conditions: The liability of Wells Fargo & Co. shall be at all times only that of a forwarder, and in no event shall it be liable for loss

25 of or damage to said property caused by or resulting from the same being improperly packed, secured or addressed; nor by or from any act of the law, or of a person acting as an officer of the law, whether acting with or without lawful process, warrant or authority; nor for loss of or damage to fragile articles, unless plainly marked as such; nor for loss of or damage to articles consisting of or contained in glass; nor shall said company be liable for any loss of or damage to said property in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said Company or its servants; nor in any event shall said Company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued unless a different value is hereinabove stated; nor in any event shall said Company be held liable for any loss of or damage to said property unless written claim be made therefor to said Company within ninety days from this date. In respect to C. O. D. goods, if the amount to be collected from the consignee on delivery is not paid within thirty days from this date, Wells Fargo & Co. may at its option return the same to the Consignor, who shall pay the charges for transportation both ways. Wells Fargo & Co. is not required to make free delivery of said property beyond its office at any station where no free delivery service is maintained by said Company, nor at any station where such free delivery service is maintained beyond the delivery limits established by said Company at the date hereof, unless otherwise herein agreed and an additional compensation paid therefor. All the stipulations and conditions in this receipt shall extend to and inure to the benefit of, each and every person or Company to whom this Company entrust or deliver the above described property for transportation, storage or delivery.

26 The party accepting this receipt hereby agrees to its conditions.

Destination, Crocker, Woolworth National Bank, San Francisco, Cal.

Date, 1907.	Articles.	Values or C. O. D.	Received by—
May 3/'07.	4 Autos		R.
	22 lamps		R.
	4 Horns, bulbs and tubes Att. (each)		R.
	5 crates		R.
	2 boxes		R.
	12 Springs		R. 4 P. M.
	4 duck covers		R.
	2 speed meters		R.
	1 leather trunk (Att. to 3111)		R.
	1 Gabriel horn (" " ")		Ryan.

Value asked and not declared.

Book marked Exhibit 1 for identification for defendant.

Judge KENEFICK: If the Court please, I suppose the stipulation would concede the actual value of the property, subject to our objections and also concede that the property was obviously of a value in excess of \$50.00, and that we knew it was of a value largely in excess of a thousand dollars. We desire to object to the competency, relevancy and materiality of that testimony, because as we claim, our liability in any event, under the shipping receipt, is limited to \$50.00, and we would like to have the Court perhaps pass formally on it now and give us an exception, and it will go to the whole case. We can argue it more in detail later on.

The COURT: Yes, I will overrule the objection and take the evidence without passing on the question now whether you are limited by the amount stated in the bill of lading or not.

Judge KENEFICK: Yes, sir. We take an exception.

27 GEORGE R. HOCHREITER, sworn for the plaintiff, examined by Mr. Becker, testified as follows:

My business is shipping clerk. I am employed by the George N. Pierce Company, Buffalo. I was so employed in May, 1907. I recall the shipment of automobiles that was sent to Crocker-Woolworth National Bank, San Francisco. The date when it went was May 3, 1907. What I first did with reference to that shipment was, I stopped into Wells, Fargo & Company depot offices and asked for Mr. Ryan. At that time I understand he was contracting agent or solicitor for the Wells, Fargo Express Company. He was absent and I left word with Mr. Rapp to have Mr. Ryan come out to see me. He came out two or three days later and I told him that I had a shipment going to San Francisco by express. I told him that I would need a large end-door car about 60—at least 60 feet long, and also told him that we wanted to load the shipment at Black Rock. He called up Mr. Germond, agent of the Wells, Fargo Express Company, in my presence, and Mr. Germond came out in the street car and they were talking about where the best place would be to place the car for loading. I also told him about when the shipment would be ready. That is the whole conversation which occurred between me and any representative of the Wells, Fargo Company at that time, or prior to that time, with reference to this shipment. On the day when they came out to see me all they were talking about was where to place the car and when the shipment was ready—when the shipment would be ready. I was in touch with them almost daily until the shipment was ready to move. I called them up several times and told them how far the work was along, so that they could have the car switched around to the city.

28 We didn't want the car switched around the city and have it stand there probably a week. Several times Mr. Ryan had called me up and wanted to know if we would surely be ready on the day that I told him. As I recall it, the first few times I told him I didn't really know at that time, but I would let him know later. And that is the way the conversation went on until the shipment was finally ready to move. The car was placed for loading

the morning of the 3d and the end door in the car was on the west side of Elmwood Avenue so we couldn't load it, and they had the car shoved across the street, into the street, in the Pierce Radiator Company's plant, so we could load from the street. There were present there representing Wells, Fargo & Company, Mr. Ryan and Mr. Germond and also Mr. Rapp. There were present representing the George N. Pierce Company four laborers and myself. That was all that I recall. I was there in charge of the matter of despatching the shipment and in sole charge of it. As to what conversation, if any, I had after the car was brought to the Pierce Company's plant, with any representative of the Wells, Fargo Express Company, about this shipment, there was really no conversation except about the loading of the car. We loaded the shipment on the car. In the east end of the car there was the automobiles and the body, and the parts were loaded into the west end, that is, the end nearest to the door. Mr. Rapp's position with the Wells, Fargo Express Company, I believe, at that time, was depot agent. Mr. Germond was the Wells, Fargo & Company general agent at Buffalo; the man who was in highest authority for Wells, Fargo & Co. at Buffalo, I understand. These three men were present when this car was being loaded. They saw the automobiles put on the car.

(Witness using Exhibit "A" to refresh his recollection.)

29 The shipment consisted of four automobiles, three of them were touring cars, one was a limousine. They were put in the car, tires inflated, and blocked the same as they would be on the street; simply put in the car and blocked. After we had the shipment all loaded we covered them up, drained off all the gasoline, in Mr. Ryan's and Mr. Rapp's presence, and covered them up with large canvas covers. They were what we call 30 horse power four-cylinder cars. They were about 13 feet long, about 7 feet high. They were five passenger cars, five seats. In the value of the entire shipment, of course the automobiles comprised much the greatest portion of the total value. Besides the four automobiles there was an automobile extra body, which was crated. The crate was made of wood. Through the crate you could see the body, but the body was covered up; just an ordinary crate with a skeleton top. The body was covered up, and top, which was also crated; wind shield. There were three or four other crates, and parts—automobile parts. After we had the cars loaded and while we were covering them up and I was looking after them, seeing the brakes, etc., were securely set and the gasoline drained off, Mr. Ryan disappeared. Mr. Rapp and I and several of the laborers were closing the end door. After we were finished I got out of the car. I met Mr. Ryan on the street, and he had the express receipt. That is this Exhibit "A." I know whose handwriting it is in. It is in Mr. Ryan's handwriting. He handed me this receipt on the street, on Elmwood Avenue. I looked it over. He wanted to know if it was all right, and I accepted it; I says yes, and I accepted it. That was all the conversation there was at that time. And then shortly after they pulled this express car away from the place we had loaded it. That is

30 the last I saw of it.

By the COURT:

Q. Who were the laborers and these men, Ryan and the others? Who were the three men?

A. Mr. Ryan was solicitor. He was contracting agent, or man looking for business. Mr. Germond was local agent of the Wells, Fargo Express Company. The other man, Mr. Rapp, was depot agent, I believe. He was at that time depot agent, for Wells, Fargo & Co. at Buffalo.

By Mr. BECKER:

I have stated all the conversation that occurred with reference to this shipment at that time, except matters merely referring to getting the cars on and packing them and so on, up until the time they handed me this receipt, and I took it for granted that that was the close. There was no conversation at the time they gave me the receipt, which I haven't told. I have now told the whole conversation that I had to say to the Wells, Fargo Company.

By the COURT:

Q. Do you say the car had been taken away before you got the receipt?

A. No, after I got the receipt. After I got the receipt the car was pulled out.

I stood there where I loaded it while I took the receipt. But it was after I had left the car and met him on the street somewhere, from the car I should say 25 feet away. It was just at the conclusion of the loading, practically.

31 By Mr. BECKER:

They got those automobiles onto the car thus: They had some skids that came with the car; they were about 6 inches wide, with a flange on each side. We put them from the ground to the box car against the end door, against the opening, and we pulled them up in the car with a block and tackle. We ran the cars up to where they were loaded with their own power; we run them up, the front wheels up onto these skids, under their own power.

Cross-examination by Mr. KENEFICK:

I had been employed by the Pierce Company prior to this shipment since March, 1898. I don't recall the date I started to work for them. So that I had been with them about nine years. I started to work for them as office boy. I became shipping clerk in 1902. For five years I had been shipping clerk. I was in sole charge of the shipping. The firm did quite an extensive amount of shipping, both by express and freight. I did business with many of the express companies, including the Wells, Fargo. And I had charge of that shipping. My duties generally as shipping clerk were, I usually ordered the box cars or express cars which were needed for the shipments; I always did all the loading myself and usually audited the expense bills. I made out shipping receipts or

bills of lading. That applied to freight as well as to express. I also traced shipments, that is, when shipments were delayed. Where we thought they were lost I would trace them. And I took care of the correspondence in general; anything pertaining to shipments. My duties also included the obtaining of quotations of rates, but we usually had the express company confirm them; that is, I examined the tariff sheets or books, and then confirmed them by communication with the express office. I had a tariff book of the Wells, Fargo Company, their regular tariff book.

Judge KENEFICK: Will you let me see that, Mr. Becker?

Mr. BECKER: (Produces book.)

This is the Wells, Fargo Company tariff book that I had. It is produced by counsel for my company, under subpoena. I turned that over to Mr. Becker.

Tariff Book Marked Exhibit 2 for identification.

I remember when I got that. I don't remember when they turned this over to us but it was one that went into effect in February, 1903. I don't recall when I got this but we had it a long time before 1907. I had it for a year or two prior to this shipment. Exhibit 1 for identification is the blank shipping receipt book of the Wells, Fargo Company which was in use by me for the Pierce Company. This book of forms had been in use by me, by the Pierce Company, since the date in here, July 6, 1906. I usually made out the shipping receipts in my own handwriting, and had the agent of the Wells, Fargo Co. sign. That is not all my handwriting, all of the columns on the pages of this book except that last column. This handwriting is mine and also the handwriting of another young man we had in our office at that time that did shipping for the parts department or the repair department. He was not working under my direction. He was working for the repair department. I had nothing to do with him whatever. He shipped repair parts only and other parts. Broken machinery or anything of that sort I took care of. I also shipped the entire automobiles. In other words I shipped all automobiles and extra bodies and the likes of that. Prior to July 7, 1906, we had the regular receipt book of Wells, Fargo & Co. Whatever it was, we had right there in our office. When we sent a shipment by Wells, Fargo & Co. express, I filled out the receipt in this book. We never made duplicates of single shipments, but in a large shipment we always made triplicates. Of the three shipping receipts the express company usually keeps one, we send one to the consignee, and we keep the third for our own reference. There is no large shipment receipt here in this book. When triplicates were made out they were torn right out of the book. And the one that we retained we usually kept on file in our office. But if the shipping receipt simply was of a few parts and of small value I made out but the single receipt, and had the agent of the express company or the driver or whoever took it, sign this book. And in large shipments we kept the receipt in the file because that

would take more than one line on the receipt. We also shipped by other express companies.

Q. And you had like books of blank shipping receipts of those companies?

Mr. BECKER: That is objected to as incompetent, irrelevant and immaterial.

Overruled and exception taken by plaintiff's Counsel.

A. Yes.

Q. Of what companies?

Mr. BECKER: Same objection.

Objection overruled and exception taken by plaintiff's counsel.

The COURT: It may be understood there is an objection to all this line of evidence and that you take an exception in each case.

34 A. American, United States. We also had a book from the National, although we never ship much over that line. Possibly the Adams Express.

This Wells, Fargo & Co. book was kept in my office. I had them all laying on top of my locker. The locker was, I should judge, about six feet high. This receipt, Exhibit "A," is one of those blanks. Whether it was taken out of this book, Exhibit "1" I don't really know.

Q. Now, do you mean to say that you did not know that he went in and got your book or that you furnished him the book on the occasion of his writing out this receipt?

A. I didn't know where he went.

Three receipts were made out. That is, the original, duplicate and triplicate. He handed them to me. He handed me the three; then I gave him his receipt. That is, I gave him back one of them, a copy. He handed me the three, I am sure of that.

Q. Don't you know that he got this book of yours which was in your office and made out the shipping receipts from b-anks that he found in the book?

A. I don't know. I didn't send him in to get the book.

Q. Do you mean to say that you did not know that Ryan went in to get the book of receipts?

A. No.

I didn't hand him the book right in the office. I don't remember where I found the book when I went back to the office, after turning over to him the shipping receipt.

On that day we started to load about 9 o'clock in the morning and we were finished about 3 o'clock in the afternoon. Mr. Germond was there until we had the automobiles in the car. That was about

2 o'clock, between 2 and 3. We loaded the extra body and
35 the parts. In other words, we hadn't finished loading the car when Mr. Germond left. We had about an hour's work to

do. I had no conversation with Germond, no particular conversation with reference to the shipment during that morning, that I recall. He was simply there looking on at the loading of the car. And I had no conversation with Ryan or Rapp particularly with reference to the shipment in Germond's presence, that I recall. Germond was

not about there at all when these shipping receipts were made out. He had gone about an hour before. I looked after emptying the tanks of gasoline. That is, it was done under my supervision. Mr. Ryan did not take care of it. Some of the men that I had working for me did. I instructed them to drain the gasoline out. That was not on Ryan's suggestion. We always drained it out. Our plant, or rather, the place where this car was located was near Elmwood Avenue. It is near the City line but we call it Block Rock. It is in the City of Buffalo. The George N. Pierce plant is on Elmwood Avenue, and right next to the railroad tracks. The car was on the switch of the Erie Railroad, which goes in to the American Radiator Company, Pierce plant. The American Radiator Company is on the same side of the street as the Pierce Company plant. When the automobiles were being loaded the car was, I should judge, about six or seven feet from the sidewalk of Elmwood Avenue. And our office was about one hundred feet away from the Erie Railroad crossing there. That is where I kept this book of receipts. I had shipped a car of automobiles by the Wells Fargo & Co. prior to this car, in the month of February, 1907. The same Mr. Ryan was concerned for the Wells Fargo Co. regarding that shipment. That shipment was also on the Pacific coast. At the time that shipment

36 was made there was also a shipping receipt made out by Mr. Ryan. He delivered it to me at the time of the shipment.

Q. Now, you were familiar with these shipping receipt forms of the Wells Fargo Co.

A. Yes.

Q. You say yes?

A. Yes.

Q. You had read them?

A. Yes.

Q. Knew what they contained?

A. Yes.

Q. And when Mr. Ryan handed you Exhibit "A" and asked you if it was satisfactory, you looked it over and said it was?

A. Yes.

Q. And accepted it?

A. Yes.

Q. You scrutinized the property to see that it was properly noted in the receipt?

A. Yes.

Q. You saw that there was written on there "Value asked and not declared"?

A. Yes.

Q. And you knew that that notation on there had reference to the printed statement in the receipt with reference to the limitation of liability?

A. Yes.

Q. And the limitation of liability to which you refer is this \$50 limitation in the printed form of the receipt?

A. Yes.

I don't believe we had ever made a carload shipment over the Wells Fargo & Co. line prior to the shipment of February, 1907.

We usually made shipments prior to that time of carloads by freight to the Pacific coast. It was our Pacific coast representative who ordered a shipment by carload to the coast by express.

37 We got a letter from the coast suggesting that form of sending on shipments. Then I did not consult the tariff book of the Wells Fargo Co.

A. Yes.

Q. And you knew that that notation on there had reference to the printed statement in the receipt with reference to the limitation of liability?

A. Yes.

Q. And the limitation of liability to which you refer is this \$50 limitation in the printed form of the receipt?

A. Yes.

I don't believe we had ever made a carload shipment over the Well Fargo & Co. line prior to the shipment of February, 1907. We usually made shipments prior to that time of carloads by freight to the Pacific coast. It was our Pacific coast representative who ordered a shipment by carload to the coast by express. We got a letter from the coast suggesting that form of sending on shipments. Then I did not consult the tariff book of the Wells Fargo Co.

They got a rate out at the coast first and they advised us by letter how much it would be. I did not also consult the book here (showing book Exhibit 2 for identification to witness). I called up the Wells Fargo Co. on that shipment. I did consult this book Exhibit 2 for identification to ascertain what was the regular merchandise rate to the coast, but I could not find anything on automobiles because it was not classified in this book. At least I couldn't find it.

By Mr. Hoyt:

I mean not by carload lots.

38 By Judge KENEFICK:

Q. I call your attention to "automobiles" under "classification" and a reference to "See vehicles," and then you would turn to vehicles under the classification?

A. Yes.

I found that automobiles were classed as merchandise. Less than carload lots double the merchandise rate. After examining the book I then communicated with the local office and in that way I got the rate. Mr. Ryan came down to see us. So that it was by personal conversation at our office, rather than by a telephone conversation. This occurred shortly after we heard from our Pacific Coast representative. I don't recall the date; about two weeks before the first shipment in February.

These four laborers of the Pierce Company remained there until we had our work finished. I don't believe they closed the whole car. I think they left one door open; side door. When Ryan disappeared for a time Rapp remained in the car. When I left the car and met Ryan on the street about 25 feet from the car, Rapp I believe was standing alongside of the car; as I recall it. He was not

doing anything with reference to the shipment. Later on we were loading another car on the other side of the street, half an hour after. Rapp was with the express car at that time.

Q. Well wasn't Ryan over at this other car?

A. He came up on the platform later; yes.

We were loading an automobile to ship by Erie freight. That was not the time that Ryan handed me the receipt. That was half an hour after he handed me the receipt. Ryan stuck his head in the box car and said, "You don't want any valuation placed on that car, do you?" I says, "No." He stuck his head—stepped into the car. I say that was half an hour afterward, and after I had
39 read on here, "Value asked and not declared." I am sure about that. It was not after Ryan asked me that, that he put this notation on there and then handed me the receipt. He handed me the receipt and I turned the receipt and the bills into the office, and I went on with another shipment. A half hour afterwards, after I had said that the receipt was satisfactory and had accepted it and told him so, Ryan came over to the car and asked me that question. Rapp, I believe, was with the express car, but Ryan walked to the end of the platform and spoke to Rapp. Rapp was not in a position where he could hear this conversation. He was outside of the freight car.

Q. Did Ryan ask you whether you were covered by insurance?

A. Yes.

Q. And therefore you did not declare; did not—

A. He says—

Mr. BECKER: Just a moment, please, before you answer the question. We object on the ground it is incompetent, irrelevant, immaterial; it does not control the issue in any way; furthermore, not within the scope of the direct-examination and subsequent to the delivery of the shipment.

Overruled and exception taken by plaintiff's counsel.

Q. What did he say to you on the subject of insurance?

A. He says, "Do you people carry insurance on this stuff?" and I nodded my head, yes, which I had a right to.

Q. Which you had a right to?

A. No. I was excited at the time. I expected a freight
40 engine to come in there most any minute to pull those cars out, and I was awful busy; I believe on the impulse of the moment I didn't know what I was saying.

Mr. BECKER: Just a moment. I desire to ask that the answer be stricken out on the ground it appears to be the mere declaration of an agent without any authority to bind the plaintiff and after any authority that he might have had had been exhausted by the expiration of the act with reference to which he was authorized.

Mr. KENEFICK: Well, this was a part of the entire transaction.

Mr. BECKER: The transaction was completed before that.

Mr. KENEFICK: We will show it occurred at the time the receipt was handed over.

Mr. BECKER: The evidence does not bear you out now.

Mr. KENEFICK: It also shows a reason for not declaring value.

The COURT: I will deny the motion at present.

Mr. BECKER: Exception.

Q. This was at the same time that he asked you if you wanted to declare value on that car, that he asked you about the insurance?

A. That was after. It was at the same time, but he asked me before he wanted to declare value, on that insurance.

Q. He asked you if you wanted to declare value on the shipment and you said no?

A. Yes.

Q. And then he said to you, "I presume that you carry insurance?"

A. No. He walked away and he came back. He was smoking a cigar. He came back and he says, "Do you carry insurance on this stuff?"

41 Q. And you said yes?

A. I nodded my head.

Q. Indicating yes; assent?

A. Yes.

Mr. BECKER: I ask that the last four answers be stricken out on the same grounds I stated before.

The COURT: I deny the motion at the present time.

Mr. BECKER: Exception.

Q. You knew the difference between a valued shipment and an ordinary shipment, did you not?

A. Only what their express receipt, the conditions read.

Q. You knew that there was a different rate for valued shipments than for ordinary shipments?

A. I knew they charged for valuation if you placed it on a shipment.

Q. You knew that they charged you a higher rate if you placed it on a shipment?

A. I did not know they charged a higher rate, but I knew they charged for valuation.

Q. Well, but you knew that the total charge would be higher if the value was declared?

A. The charges all told would be higher, yes.

Q. And that was the reason that you did not declare the valuation?

A. Yes.

Mr. BECKER: I object to that as incompetent, irrelevant, immaterial and not binding on the plaintiff.

The COURT: Sustain the objection.

Mr. BECKER: And ask that the answer be stricken out.

Judge KENEFICK: Just a moment, if the Court please. This was the agent of the Pierce Company. We want to show the reason he did not—

42 The COURT: What his reason was is not material. You may show all the facts. You may prove facts which would tend to show the reason.

The operation of his mind.

Judge KENEFICK: We are in the position of examining the plaintiff himself. This is the company. We want to show, and we think we ought to be entitled to show that the reason for not declaring a valuation was that they would get this shipment moved at a less freight charge than if they did declare a valuation.

The COURT: That is obvious. It is for the jury to say I suppose. It is always the reason. I sustain the objection.

Judge KENEFICK: We take an exception.

Mr. BECKER: I think the answer was recorded, Your Honor, and I ask to strike it out.

The COURT: Strike it out.

Judge KENEFICK: We take an exception to the rulings of the Court. That is all.

Redirect examination by Mr. BECKER:

There was not any insurance placed on that stuff as far as I know; when it is in transit.

Recross-examination by Judge KENEFICK:

There was no insurance on this shipment so far as I know.

Q. Well, why did you tell us that there was insurance on the shipment?

A. Well, as I said before, I was excited and wanted to get finished. They expected an engine to come in and give us a shift, and I thought that their deal was closed.

Q. Is that the only explanation that you have got for telling us what was untrue?

43 A. That is the only explanation I think—I was excited.

Q. Well, is that the only reason that you have for making that statement to us?

A. Yes. I knew the stuff was insured up to the time that it was put in our shipping room——

Q. You knew that at the time, that it was only insured up to the time it was put in the shipping room?

A. Yes.

Q. And that after that, it was not?

A. After that it was up to the transportation company?

Q. Up to the transportation company after its being put in your shipping room?

A. After we had loaded it in the car and got a receipt for it.

Q. Then, if you knew or thought that it was up to the transportation company, can you give us any other reason except what you have given for telling us that there was insurance on this shipment?

A. I told you that I was so excited at the time because they were bothering me, and in fact I don't believe I was accountable for what I told them at that time because the engine was coming down the

track to give us a shift. We wanted to get this car blocked. We had it in this box car, because it was worth at least \$4,000.00 and if it got a good hard bump it might have damaged it.

Q. Well, you could have said no as well as yes, could you not?

A. Yes.

Q. And with as little trouble?

A. Yes.

During the year 1908 I had an interview with Mr. Ryan on the subject of this shipment, a talk with him. I believe he was
44 out to the office once. I did say that my failure to declare a value on the consignments was in compliance with orders given me. Orders had been given me to that effect, that I shouldn't put any valuation on the shipments going by express. Our treasurer gave me those orders. I didn't also say that the Pierce Company's attorneys had advised me that that was not necessary. I don't remember any talk about legal advice on that subject. I told him I understood the law was that the transportation company was responsible for stuff after they accepted it and gave us a receipt for it. I didn't tell him that these orders had been given out after having obtained legal advice upon the subject. I didn't tell him that at one time we had declared values on shipments and that that practice had been discontinued because of legal advice. We did pay valuation on express shipments years ago. I didn't say that that practice had been discontinued because of legal advice obtained on the subject. I told him that practice had been discontinued, but not on legal advice.

Mr. BECKER: I suppose you will stipulate that this express car was Erie, Wells, Fargo & Co. car No. 227 and that it became part of Train No. 1 which reached Norborne, Mo., on the Atchison, Topeka & Santa Fe Railroad about on the 6th day of May, 1907.

Judge KENEFICK: We will stipulate that.

Mr. BECKER: Now, if the Court please, I will read the depositions. I will first call your Honor's attention to the stipulations: "It is stipulated that objections going to the materiality, relevancy and competency of the evidence may be reserved for the trial of this cause and that objections to the form of the questions be waived, except as noted."

Depositions de bene esse taken at the office of William
45 Traughber, in Carroll County, Missouri, on the 19th day of November, 1908, between the hours of 9 a. m. and 6 p. m., pursuant to notice of the plaintiff to the defendant, which notice is attached to these depositions.

William Traughber, a notary public in and for the State of Missouri, and County of Carroll, duly administered the following oath, to wit:

"I do solemnly swear that the testimony which I am about to give in this case shall be the truth, whole truth and nothing but the truth, so help me God," to the following witnesses:

James Berry, Clarence Hicks, August Hanks, Lawrence Grable, George Berry, Clay Proffitt, Harry Burge, Samuel Vanderpool, Noah Burnette, William Tomlin.

JAMES BERRY, of lawful age, being first duly sworn, upon his oath testified as follows:

Direct examination by attorney for plaintiff read by Mr. BECKER:

My full name, age and residence are James Berry, residence Norborne, Missouri, about thirty-six years old. I was employed in May, 1907, by Mr. Hanks, working for the Santa Fe Railway Company as section hand. The portion of the track of the Santa Fe Railway this section gang had charge of was to the west of Norborne. I remember the day of a certain wreck on the Santa Fe Railway tracks west of Norborne. It was passenger No. 1. It was in 46 the morning about nine or ten o'clock. There was no other wreck of No. 1 Passenger Train, or of any other passenger train, on the Santa Fe Railway, in that vicinity about that time, that I know of. If there had been any other wreck on May, 1907, west of Norborne, of any train operated over the Santa Fe Railway, this side of Nimrod, I think I would have known of it. I would over that section where I was at work, but I wouldn't say over at the west end. That portion of the track where the wreck occurred was a part of the track over which I was working as a section hand. I do not recall the day of the month on which this particular wreck happened. It was in May. I had occasion to go over this track on the day of the wreck, prior to the time when the train was ditched. I came over it in the morning. Mr. Hanks, Mr. Berry and Mr. Hicks here and another Mr. Hanks were with me at that time; that's all I recollect of now. Our gang started on the morning of that day from the tool house and proceeded west. We went about half a mile east of Nimrod. The first information we had with reference to a train being in the ditch, was, well we could see it, and some little boys came down and told Mr. Hanks it was in the ditch. We went down on the handcar to the scene of the wreck at that time. The train was in the ditch the other side of this first bridge there. It was in the ditch on a portion of the track between Norborne and the place where we had been repairing. We had gone over the track where this particular wreck occurred on that morning, on the handcar. Prior to that I had been working on the Santa Fe with the section gang a month or two. Prior to that employment about seven or eight years ago I worked on the section. During the time that I was employed by the Santa 47 Fe Railway Co. prior to this accident, we went over this particular track, where we saw the train ditched on this date, every morning and evening when we went to do our work. I had observed the condition of the track at this place where the train was ditched prior to the day of this accident.

Q. Now will you state whether or not the condition of the track at that point remained the same with reference to the ballast and

its condition up to the time of this accident during the time you were employed?

A. Well, we pumped up the track every few mornings and it looked to me it did.

I observed the condition of the track prior to the morning of the accident.

Q. Now, will you tell us what you observed with reference to the level of the rails of this track at this point where you saw the train in the ditch, later in the day?

A. I didn't stop to put any level on it at all, but there were sags in the track. I mean by "sags" the track was down—a sag in the track. I was able to see this sag in the track. As to the sag on the north rail of the track I couldn't tell how long it was; I didn't stop to put a level on it. It seemed to be a little low. I could not positively state how that was, but it looked to be three or four inches low. The other rail of the track was pretty near in the same condition. This estimate of the amount of the sag is my best opinion from my knowledge of the track at that time. The dump is that low, I would take it to be that.

Q. Can you tell me if there was more than one sag at this point on the north rail where the train went into the ditch?

A. Well, no. The track was not exactly right all the way up there, but I could not tell you how much—how high or low it was.

48 This track at this point is constructed on the fill. I can't tell the character of the ground beneath the fill. The ground was tolerably high. That is, the dump is, but between the track and out from the track it is level. The ground was wet at that time. There had been rains in the vicinity of Norborne prior to the time of this accident. We had rains, plenty of them. How many cars were ditched on this occasion I don't believe I know, but I think there were three cars off; three or four, I wouldn't say exactly. I think they were off on the side of the rail—off the dump there; the track was torn all to pieces there. I noticed that a portion of the track at that time at that place was torn up; how much of the track I can't say exactly; must have been three or four hundred ties; I wouldn't state positively how many. I saw an express car in the ditch at that time. I think it was a Wells Fargo Express car. When we got there the car was afire. This was a passenger train. I think the express car was supposed to be on fire. This express car burnt up. I saw the wreck after the fire had consumed these cars. I was there all day. I worked there all the time. I saw what remained of the contents of these cars. I saw iron, trucks, etc.—

Q. What was the nature of the iron you saw there? Did it have form?

A. Yes, sir; as well as I noticed it had form all right. I really didn't pay much attention to it because I hadn't much time to.

Q. Could you tell from viewing the remains of the contents of the car what had been the contents of that car?

A. It looked to be trucks of a car or something of the kind.

49

Q. Was there more than one truck there at that time?

A. Well, it was piled up there; I didn't pay particular attention as to how many—it was all piled up there. I couldn't state exactly.

Q. When you say there was trucks of the car or something, do you refer to the car-trucks or to trucks of some contents of that car?

A. I am referring to some contents of the car because they were in the center of the car.

I have knowledge of signals lanterns or flags being put out along the line of this track at a time just prior to the ditching of this train either the night before or on the morning of the accident. On Sunday evening there was a lantern put out.

Q. Who put it out?

A. I don't remember; seems to me like—four or five of us were called out there and it was put out while we was out there. The lantern was put out by a member of the section crew in which I was working.

This wreck happened on Monday I believe. This lantern was put out Sunday evening. I could not tell exactly the color of the lantern. As to the purpose of the lantern and what it was intended for in railway operations I think I know—I am not certain that the lantern was put out there for an order of some kind. It was put there for slow order, I reckon—I don't know. I had not been familiar with railway operations prior to this employment with the Santa Fe. We put the lantern out that Sunday evening. I don't recollect whether Mr. Hanks told me or not. It was under Mr. Hanks' direction that this lantern was put out. This lantern was put about a quarter of a mile, may be a half a mile, this side of where the wreck was on the hill. By this side of the wreck I mean towards Norborne. And a train coming from the east would then pass this lantern before it would arrive at the place where the wreck occurred. With reference to the character of the grade, there was a grade in this particular line of track, between Norborne and the place where this accident happened. The grade is up and down—what I call up and down hill. The hill I refer to is right here (witness indicates with pointing his finger), right west of town. By the hill I mean the top of the grade; that is the top of the grade there, the top of the hill. From that place I have designated as the "hill" there was a down grade on the other side; I could not say how far it goes. I am not able to state how far from the bottom of this grade this wreck occurred. From the hill to the place where the accident happened it was, I would say, about half a mile. Well, it is down grade after you pass over the hill, but I don't know whether it is as far as the wreck or not. How many feet the grade extended at that time I could not tell you; it might be a quarter of a mile. I suppose it is about a quarter of a mile.

Cross-examination by defendant's counsel read by Judge
KENEFFICK:

I am not an employé of the Atchison, Topeka & Santa Fe Railway

Company at the present time. I left their employ sometime in May, 1907. I didn't state for certain that it was in May that I quit the company, but it was shortly after the accident. When I first began doing section work I don't remember; must have been in the fall of 1906. I worked during the winter. I laid off a few days. I was there almost continually until May. Seven or eight years ago

I worked on the Santa Fe a few months.

51 The track at the point of this accident is elevated above the surrounding land. I would say six or seven feet. It might be as much as four feet; I wouldn't say positively; about four feet, something like that.

Q. With what was the track ballasted at that point at that time?

A. Well, we had cinders.

Q. Anything else?

A. A little ballast there.

Q. Did you have any gravel?

A. I don't recollect any gravel.

By a "sag" in the track or in the rails, I mean it was low. I don't say the joint,—there was a sag in the rail; at what point, whether in the middle or at the end, I couldn't say exactly. I didn't pay any particular attention to it. I noticed this sag in the rail every few mornings as we went to work. I did not call the attention of my superior officers to this sag. I did speak to Mr. Hanks about it, there, I said, "It looks a little bad."

O. Prior to that time you never mentioned the condition of the track to any one, did you?

A. Oh, I don't remember. I said, "The track is bad."

Judge KENEFICK: We ask to have the latter part of answer stricken out as not responsive. "I said the track was bad."

The COURT: I grant the motion.

Mr. HOYT: We take an exception.

I had worked at the point of the accident prior to the accident, just a few days before the accident. We raised the track—put in cinders. We were ballasting the track. After this work I have now described was done the track was in very good condition.

52 From that time up to the time of the accident it wasn't in first class condition, but it was up in fair shape. I considered the work which we had done at this point a few days before that as being done in good workmanlike manner. The work which I did at the point of the accident, and which I have described, as being done a few days before the accident, was directed towards leveling the track at that point. There was no work done at that point subsequent to the time which I have described of doing this work and before the accident. The track at that point I could not say whether it is straight. I am not sure whether there was at the time of the accident a curve at the point in the railroad track at the point of the accident. I don't think I ever had any conversation with the foreman in charge of that track with reference to the condition of the track at the point of the accident. I spoke in my direct examination of a conversation I had with Mr. Hanks. He was a brother of Mr.

Hanks here, the foreman. His position was a section hand, same position as I had.

Q. How long before the accident was it?

A. The morning of the accident I says, "It may go by night"—

Judge KENEFICK: I ask that the answer be stricken out as not responsive.

Motion granted and exception taken by Mr. Becker.

Redirect examination by plaintiff's counsel read by Mr. BECKER:

When I had this conversation with Mr. Hanks' brother we were all in the car. Mr. August Hanks was present. Mr. August
53 Hanks is the foreman. We were all together on the hand-car at the time of this conversation. The car is four, five or six feet long and about seven feet wide, I guess. Henry Hanks and myself were on the rear end of the car and I spoke to him about the track there, and says: "It may go off tonight, but I doubt it," or something like that. The nature of the ground between the ballast and the bank at this point with reference to wash was—there wasn't much wash about it—the ground seemed to be soft. The dump at this point seemed to be soft.

"Q. Had you any knowledge with reference to any effort being made by your foreman to secure ballast for this track along that portion of the track which he had in charge, prior to the time of the accident?"

Objected to by defendant's counsel as incompetent and immaterial. Overruled and exception taken.

"A. Well, I heard Mr. Hanks say a time or two that he tried to get them to send something—some ballast or something for this place."

Judge KENEFICK: I ask to have the answer stricken out on the same ground.

Motion granted and exception taken by plaintiff's counsel.

Maybe they sent one or two loads of cinders, maybe more. I don't recollect now. At the point where this train went into the ditch, the ballast came, just prior to this accident, about half-way up to the ties, I suppose. As we would go out in the morning, the foreman would go with us.

54 Recross-examination by Defendant's Counsel, read by Judge KENEFICK:

On the morning that I have testified to as having this conversation with Mr. Hanks, the fellow section hand, I was going from Norborne towards Nimrod. At the time this conversation was being had the car was in motion. That hand-car makes much noise. I was on the hand-car, at the rear end. Next to me was Henry Hanks. My conversation was directed particularly to Henry Hanks. August Hanks was on the front end of the car.

WILLIAM TOMLIN, of lawful age, being first duly sworn on the part of plaintiff, testified as follows:

Direct examination by Plaintiff's Counsel, read by Mr. BECKER:

My full name is William Tomlin. I am a resident of Norborne, Missouri, for the last forty years. I was employed in May of last year by Harry Burge. I was working for the Wabash with the section gang. I remember the occasion of No. 1 passenger train on the Santa Fe road running into the ditch west of Norborne during the month of May of last year. I was right by and seen it. I was working at that time on the Wabash road right close to where this wreck was. The tracks run parallel with each other pretty well. Prior to this train going into the ditch and at the point where it subsequently went into the ditch, on the morning of this accident, I had looked at that particular portion of the track. I went to this portion of the track on the Santa Fe on the morning of that accident, before the accident. Mr. Burge went with me. We examined the track and the rails of the track at the time to determine its condition.

55 Mr. Burge and I looked at the track. With reference to the condition of the rails of the track, my opinion was that the rail was about six inches down on the north side, understand. On the south, I think would be about eight inches. We had had rains in the vicinity of Norborne just prior to this accident. The ground was a little bit wet. This was a bad spouty place right in there. I saw No. 1 train doing down the track prior to this accident. It was in the morning. I have a pretty good idea of the speed of trains. The speed of that train, in my best opinion, was 45 or 50 miles at the point where it was ditched. The train at that point went into the ditch; the baggage car and the car that had automobiles in it. I don't think there was but two, as I remember. When it went into the ditch, the baggage car caught afire and set the whole thing on fire. It burnt up the express car in which the automobiles were. I seen four automobiles, as far as I could see. I saw the remains of the automobiles after the fire had consumed the wooden portions of the machines. I seen what was left, but there wasn't anything, only just the frames. I never counted them. Prior to this accident there was a flag west of where the wreck was, a yellow flag, slow flag. The yellow flag means slow to the operator of trains, slow. That was the only signal I saw on the Santa Fe track in the vicinity of this wreck, before the wreck happened. That is the only one I know was there. The danger flag is the red flag. When I throw that on he's got to stop. I have been working as a section hand about ten or twelve years. In the work I have been required to do as section hand I have had occasion a little bit to put out various signals which would indicate to train operators what they should do; not altogether. The Wabash don't use the same colors as the Santa Fe. I have put out flags. During the time I have lived in Norborne I have worked as section hand for the Santa Fe. During the time I was employed by the Santa Fe Railway Company I was employed as a section hand. Dur-

56

ing the time that I was employed I never put out flags on the Santa Fe; other men in our gang do that. As used on the Santa Fe along the line of the accident the yellow flag is slow flag; red flag is danger.

Cross-examination by Defendant's Counsel, read by Judge KENEFICK:

I say I have been in the employ of the Santa Fe Railway Company. I left the employ of the Santa Fe Company along in August. It was not prior to the accident in question, in 1908. It is I reckon 10 or 12 months since I worked for the Santa Fe. My occasion for leaving the Santa Fe was just because the Wabash paid more money. That's the only reason I had. I've got nothing against the Santa Fe. I said that before the accident I was over on the Santa Fe tracks and knew the condition of the tracks at that point. Me and him (pointing to Mr. Burge) was there together, I suppose between 20 and 25 minutes before the accident. I did not take any means to notify the Santa Fe Railway Company or their employes or agents of the condition of the track. That was none of my business to. I certainly did not take any steps towards signalling the train or of giving any signals whatever as to the condition. I was working for the Wabash, and I just seen this. I certainly took no means or no steps towards notifying any officers, agents or employes of the Santa Fe of the condition of the track, at that point, nor took no steps of signaling the train as I saw it coming.

57 Redirect examination by Plaintiff's Counsel, read by Judge KENEFICK:

I did not see the section gang of the Santa Fe Railway Company on the morning of the accident.

Recross-examination by Defendant's Counsel, read by Judge KENEFICK:

I saw the train approaching at the time of the accident, some distance from me. When I first noticed it I guess it was about half a mile between the depot and the wreck. When I saw the train approaching I was standing on the ground, right on the north side of the Wabash track, and I remained in that position until the train was ditched.

HARRY BURGE, of lawful age, being first duly sworn on the part of plaintiff, testified as follows:

Direct examination by Plaintiff's Counsel, read by Mr. BECKER:

My full name is Harry Burge. I am employed by the Wabash Railroad Company as foreman of section No. 51. I was engaged in that work in May, 1907. Section 51, with reference to Norborne, begins west side of the corporation line of Norborne, extends west about six miles. The Santa Fe and the Wabash tracks—west of

Norborne—for the first four miles, they run parallel. The distance between these two tracks is possibly 200 feet. I recollect the date that the Santa Fe train was wrecked west of Norborne, in May, 1907. The number of that train was No. 1. It was May 6, 1907. On the morning of the day and prior to the wreck I went over to the Santa Fe tracks. I walked over there. Mr. Tomlin was over there,

but whether he went with me or not I don't know. Whether
58 he and I were over on the Santa Fe track at the same time I could not say. I went over on the track on May 6th, possibly twenty minutes before the train went into the ditch. I subsequently saw the train in the ditch. With reference to the point at which it went into the ditch, I noticed the level of the rails. It was out of level how much, I don't know. I could see with my eye whether there was a difference in the level of the track. It was plainly visible to the eye. I looked at the north rail. The south rail was a little low, but the north rail was the lowest, how much I don't know. The condition of the south rail of the track was such that you could look down the track and see it with the eye. The north rail of that track was possibly three inches low. It was out of level. The track was three inches below the grade of the rails of the track, below the surface. The difference in the level on the south rail of the track was possibly one inch. I did not notice any other difference in the level other than these two I have mentioned on either the north or the south rail of the track. Prior to May 6th, 1907, there had been considerable rain in the vicinity of Norborne. The ground at this particular place where the accident happened was wet and swampy ground. With reference to the embankment I cannot state what was the character of the ground.

Q. Can you tell us with reference to the ballast how much of the ties of the track was imbedded in the ballast?

A. It was just half ballast.

I have been engaged in railway work sixteen years. I have worked as foreman and as section laborer. During that time I have had occasion to observe the operation of trains with reference to the rate of speed, only by taking notice of them. I have taken notice.

59 Q. Are you able to determine approximately the rate of the speed of that train as it is moving by observing it?

A. Nothing but guess work, of course. I cannot give an opinion as to the rate of speed.

On the Santa Fe track between Norborne and the place where this train went into the ditch, there is a grade west of town, a down grade, for a short distance; not over 600 or 700 feet. The train left the track I suppose about 200 or 300 feet west of the bottom of the grade. I saw the train coming on the morning of the accident. I first observed this train as it was coming down the track, at that point one mile east of where the accident happened. I didn't pay attention until it got within a couple hundred feet of the ditch. I observed the train coming down within 200 feet of the place of accident. It was running fast. At the time I observed it, it was about 200 feet away and running about 60 miles an hour. That is my best opinion from my sixteen years of observing the running and operat-

ing of trains. Prior to this accident I could not say whether I had seen any flags or signals that had been placed during the day or night along this line of the Santa Fe track. I have seen signals along the Santa Fe track, but I couldn't say about that train; just prior to this date. I have no recollection, not at that place. The kind of ballast they had on this track at the time of the accident was cinders. I do know whether or not they had been having difficulty in getting ballast for this place. I saw this train at the time it went into the ditch. Two cars went into the ditch. There was a mail car, express car or baggage car, I don't know what. I did not see the contents of the car that I have designated as the baggage car or express car. I cannot tell what the marking was on the car.

60 I cannot tell whether it was a Wells Fargo car or not. The Express Company operating over the Santa Fe was the Wells Fargo Express Company. I saw this car which I have designated as a baggage car or express car after it went into the ditch. It caught fire. As to seeing the contents of any of the cars after the fire had burned them, I saw the rims of wheels, that is all, about twenty-inch wheels. I was able to tell from my observation of those wheels it was an automobile. I don't know how many I saw. On the morning of the 6th of May prior to this accident, I saw the section gang of the Santa Fe. They came out as we did. Both went in the same direction. The section gang of the Santa Fe passed over this particular place of the track which I subsequently examined and at which place the accident subsequently occurred. It was not raining that morning.

Cross-examination by Defendant's Counsel, read by Judge KENEFFICK:

"I state that I was at the point of the accident about thirty minutes before the time of the accident.

Q. Did you take any steps toward notifying the Santa Fe Railway Company, its employees or agents of the condition of the track at that point?

A. No, sir. I understand that there was a slow order out."

Judge KENEFFICK: We do not read the last part of the answer. That was not responsive and we ask that it be stricken out.

Mr. HOYT: We ask that the whole answer be read.

The COURT: I grant the motion.

Mr. BECKER: Exception.

61 I did not take any steps toward flagging or otherwise attempting to notify the approaching train of the condition of the track. As to the condition of the height and the lowness of the track at this point, I simply used my eye in forming an opinion. I had no instrument to measure it. After the train came within two hundred feet of the point of the accident, I watched the train from there up to the point of the accident.

GEORGE BERRY, of lawful age, being first duly sworn, upon his oath, testified as follows:

Direct examination by Plaintiff's Counsel, read by Mr. BECKER:

My full name is George Berry. I am a resident of Noborne, Missouri. I was employed in May, 1907, by August Hanks, working for the Santa Fe Railroad. I was employed as section hand. My section was No. 11 C. That section begins right here in Norborne and extends west six miles, I think. I remember the date of the Santa Fe train west of Norborne, going into the ditch in May, 1907; May 6th, 1907. That happened in the morning. My best recollection is somewhere between 9 and 10, probably 9:30. The number of that train was No. 1.

Q. What time was No. 1 due to arrive at Norborne on that day?

A. I could not answer. It was before the time this wreck occurred; somewhere near 9 o'clock; I could not say exactly the minute; I don't know.

I do not know whether or not the train was late that morning. If I had known the schedule time I could not tell whether it was late or not.

62 I went out on our section on this morning of May 6, 1907. We left somewhere about 7 o'clock. We went west. We went on the hand car. James Berry, August Hanks, James James, John Browning and others were with me. The duty of that car of men with reference to No. 11 C is to put the track in passable condition, in safe condition. That was the gang of men that had charge of the track on that section. Our foreman was Mr. Hanks. We went out over this particular line of track during the week, generally twice a day, out and in over the track. Ordinarily we went out and back where this wreck happened most every day; never failed to go. Our crew had difficulty in getting ballast to work this track prior to this accident. The time we had been having difficulty in getting material for ballast, as far back as I know, was about in October of 1906, and we had trouble up to May, 1907. Along our section there had been placed from October, 1906, to May, 1907, nothing more than a few cars of cinders. How many cars at most I could not say. When I say a "few" I mean possibly five or six, something like that. Prior to May 6, 1907, in the vicinity of Norborne we had severe rains; extending over not but very few days prior to May 6, 1907. On May 6, 1907, we had a big rain. The nature of the surface of the ground at the place where this wreck occurred was low and swampy, with reference to the condition of the ground on the day of this wreck, it was wet. At the place where this accident happened, on May 6th, and during the five days prior to May 6th, we had occasion to pass over this track probably four times each way, making eight times over the track. During that time I observed the condition of the track at the point where the train went into the ditch on May 6th. On the morning of May 6th as I went out on the hand-

63 car I observed the condition of the track. The track was out of level. When I say "out of level," I mean with reference to the rails of the track; there was a low place in the track, lower than the track should be. When I speak of the level of the track, I mean the normal level of the track, true to each other. With reference to that level, as I have explained, the condition of the north rail of the track at this point on May 6th where the train went into the ditch, it was low, probably $2\frac{1}{2}$ or three inches below the level; and with reference to the south rail of the track probably an inch and a half low. There were other depressions.

Q. State how many?

A. I could not say; probably extended something like 1,000 feet.

Judge KENEFICK: We ask to have the answer stricken out as incompetent, immaterial, as having no application to the place of the accident.

The COURT: It is not responsive. I will strike it out.

Mr. BECKER: I except. I think it is responsive. (Answer repeated.)

That is his way of answering by saying it extended over a thousand feet.

The COURT: I will strike out the latter part of the answer—"probably extended something like 1,000 feet."

Exception to plaintiff.

On the morning of this day our crew was going to work east of Nimrod; a half or three-quarters of a mile. As our hand-car went along this portion of this track, where the train was subsequently ditched, I had no conversation with August Hanks, with reference to the track.

Q. Did you have any conversation in his presence (August Hanks)?

64 Judge KENEFICK: We desire to object to that on the ground that any conversation had between these two section hands cannot bind the Santa Fe or this defendant, and therefore it is incompetent and immaterial.

The COURT: Does it appear who Hanks was; what position he occupied?

Mr. BECKER: It appears that there were two Hanks; one was foreman and the other was section hand.

Sustained, and exception taken by plaintiff.

Mr. BECKER: I assume that the same objection and exception will exclude all the following questions:

Q. Where was he standing at that time?

A. He was either on the front or north side of the car, he was towards the front end.

Q. And where were you?

A. I was on the back end, on the south corner.

Q. How far were you from him?

A. Probably four feet.

Q. In what tone of voice did you speak at that time?

A. Speaking just as low as I am now.

Q. With whom did you have this conversation?

A. With James Berry and Henry Hanks.

Q. What did you say?

A. Well, I made the remarks saying that there was no use going any further west of where we were to work.

Q. Was your work that day with reference to repairing tracks?

A. Yes, sir.

With reference to ballast at this place where the wreck occurred there was on the morning of May 6th very little there. In
65 spots the ballast was torn out right down to the bottom of the ties. There was nothing to fill in this with at all. The condition that I have stated applies to the condition of the track at this place. The effect of rain upon the fill and ballast along that line of the track was, it had a tendency to weaken and shorten the track. I have been engaged in railroading 10 or 12 years. I am able to tell what was the cause of the "sag" or unevenness of the level of the rails in this track at this place. During this number of years my work has had to do with nothing more than repairing of the track, or helping to.

Q. Now, state what, in your opinion, was the cause of the sag in the rails of the track that you have testified to?

Judge KENEFICK: I object to that as incompetent, immaterial. Witness not shown qualified to speak.

The COURT: I will sustain the objection, I think. It is a matter in which the jury can form a judgment just as much as an expert.

Mr. BECKER: Very likely, it is obvious; I think, however, that the answer itself is competent on other grounds, your Honor. I will show it to you (p. 43).

Objection sustained. Exception to plaintiff.

Q. State whether or not the sag in the track was because you had insufficient ballast at that place?

Same objection, ruling and exception.

On the morning of May 6th, prior to this accident, there was a signal or flag west of this point and near Nimrod. It was slow order flag. Its color was yellow. I am familiar with the various flags used by the Santa Fe Railway Company. At that time that controlled the operation of the trains. I was familiar with the "slow order" signal. The color used at that time was yellow.

66 The flag that I have mentioned was of that color. I could not say whether or not a slow order had been issued by the Santa Fe road with reference to the operation of trains over this particular line of track. During the time I was employed by the Santa Fe Railway Company it was our duty from time to time, under the direction of our foreman, to put out signals intended to regulate the movements of trains over the track. We had to do so. We put our flags, in general, both prior and afterwards. When

I first heard of the wreck I was half or three-quarters of a mile east from Nimrod; probably $2\frac{1}{2}$ or three miles away. The track along there was straight. I arrived at the scene of this wreck in about thirty minutes. The cars were off of the tracks. I didn't count the cars. I was busy. There was probably four or five. There was a chair car, baggage car, express car and—I don't know what the other cars were—off the track. I noticed the markings on a car. It was Wells Fargo Express car. I saw the contents of the car. I saw the fragments. The complete contents of this express car burnt. I saw the contents of that car; nothing but machinery of some kind; I don't know what. I could not say what was the length of the car. It was a large car. I helped repair the track subsequent to the accident. About 400 ties were torn up there by reason of the accident. There were 18 or 20 ties to a rail and thirty-two feet to each rail. I was familiar in May, 1907, with what the various flags used by the Santa Fe Company indicated. The yellow flag indicated a slow order.

Q. What rate of travel over the road, if you know?

A. Well, I think that depended on the rate of miles they wanted to go, as to the rate against the flags.

67 Q. What was the rate at which a train at that time could go against the yellow flag?

A. I could not say at that time on that morning.

Q. Ordinarily, what was it?

A. Well, twenty miles; ordinarily twenty miles.

I did not have any knowledge of any other orders used in connection with that flag on May 6th.

Cross-examination by defendant's counsel read by Judge KENEFICK:

I was on a car that morning. All these people I have enumerated were on this hand-car. This conversation I say I had with Mr. Henry Hanks and Mr. Berry was while the car was in motion. The car makes considerable noise. I was talking in a low tone of voice. I was on the rear end of the car, and Mr. August Hanks was either on the north or the west side. I don't know which. I didn't put out a slow flag on the morning of May 6, 1907. There was a slow order flag on that morning. It was located east of Nimrod and west of the point of the accident. How far west in miles I could not say, because I never located exactly the point where the flag was put out. The distance was three miles, I think, something like three miles west. Whether there was a slow order flag east of the accident I could not say on that morning. I saw none. I had been working in this gang the week prior to this accident. I had been at work in this gang on Section 11 C the week prior to this accident. I could not say whether I had been working every day that week. I do recall repairing the track a few days prior to the accident; not over two or three days prior. The work I did at this point consisted of leveling the track. We used what ballast we had

68 there. The custom of the Santa Fe Railroad Company in reference to placing ballast upon the ties, the manner in which they put it in, was, they placed it about level with the ties. They left it level with the ties in the center. I could not say whether it sloped down at the sides or not. I have no recollection as to the manner of dressing the track at the time of the accident. I have no recollection as to the manner of dressing the track at the time we repaired it, prior to the accident. After these repairs were made in the track at the point of the accident two or three days before, the track was then left in a level condition. It was in a passable condition at that time. On the morning of the accident we did not stop at that point on our way west. We did not stop at that point at any time on the morning prior to the accident. I say that I observed the condition of the track simply by passing over it on the hand-car. The speed at which the hand-car was going that morning, the 6th day of May, at or near the point of this accident, was probably twelve or fifteen miles an hour. I think I could describe the manner of operating this hand-car: You just take hold and pump on it; you just simply start the car and pump up and down, up and down; and go on out with it; that's the only way. You just use main strength. There are two levers on a hand-car. To operate it you stand facing each other. Raise the lever this way. I was operating the lever on that morning. I was facing the west. I did pay special attention to the track at the point of the accident at that time. The track at the point in question is elevated above the surrounding land, I think, something like five or six feet; may be more. I have spoken about it raining on May 6, 1907; I think it did not rain on the morning prior to the accident. The rain which I have testified to was subsequent to the accident. What the condition of the morning of the accident and prior to it, 69 of the day, was, bright, dark or cloudy, I don't recollect. All I know is, I know it was raining at the time we were working after the wreck and rained pretty much all day and night. I don't recollect whether at 9 or 9.30 or 10 o'clock the sun was shining. I never paid no attention. I could not say. I had nothing to cause me to remember.

Redirect examination by plaintiff's counsel read by Mr. BECKER:

There was a supply of flags, including yellow flags, among us men of the Santa Fe at the time of the accident which we could have used. We had flags. I could not say how many or how great a supply. We did have yellow flags. I don't know how many. As we went over this track that morning on the hand car, I was able to determine from the motion of the car in moving along this portion of the track, the condition as I have testified to. I have no recollection of a severe rain-storm on May 3d, prior to this accident which turned into snow. I know there was a rainstorm which turned into snow, but I could not recall the day. It was prior to the accident. I think it rained before, I could not say. During the years I

have been employed as a track man, I stated that I have been engaged in repairing tracks.

Q. Did you repair the tracks and place them in condition in accordance with the speed that the train could be operated over that particular track?

Judge KENEFICK: We object to that testimony as incompetent, immaterial, witness not competent to testify on that subject, also not a proper subject for expert testimony.

Overruled and exception taken.

70 A. That is what we was told to do.

Stricken out on defendant's motion and exception to plaintiff.

I am familiar with the character and condition of a track in order that a train could operate on it at various rates of speed.

Q. Now, that you observed the condition of the track at this place on May 6th, 1907, what, in your opinion, would be a safe rate of speed to operate a passenger train, consisting of four or five cars, over that particular portion of track?

A. Fifteen miles, not exceeding fifteen miles in hour.

The time in the morning when we went by this place where the wreck occurred was possibly 7.15 or 7.20, something like that.

SAMUEL VANDERPOOL, of lawful age, being first duly sworn, upon his oath testified as follows:

Direct examination by plaintiff's counsel read by Mr. BECKER:

My full name is Samuel Vanderpool. I have resided in Norborne and vicinity about twelve years. I have been engaged in work on the section gang, either for the Wabash or for the Santa Fe, about two years. I was employed in May, 1907, by Mr. Burge, working for the Wabash. I was on a section of the Wabash west of Norborne on the morning of May 6th, 1907. I saw the section gang of the Santa Fe that morning. I saw them at the tool house, not after seven o'clock. They went out that morning too, went west. We went that morning a mile and a quarter. On the morning of

May 6th, 1907, I went further west than a mile and a quarter.
71 I went nearly to Hardin, but that was after the wreck. Before the wreck I went west of Norborne about a mile and a quarter. Of course I never measured the ground, you know. On that morning I saw a flag along the line of the Santa Fe between Norborne and the place where I was working. It was yellow in color. The flag was placed between Norborne and the place where the train was ditched, on the Santa Fe track. I don't know much about the various flags used by the Santa Fe—those that were used at that time. I never had much dealings with the Santa Fe. I do know that the flags are used to determine the operations of trains over the tracks. They used them for that purpose. I did not go over and see this Santa Fe track before this wreck. I saw train No.

I as it was going west on this track, on the hill there. I don't know where; how far east of the place where it was ditched, I didn't measure; probably a quarter of a mile, something like that. I noticed the speed of the train at that time.

Q. Are you familiar with the operation of trains and in a general way familiar with—and are you able to tell approximately the speed a train is running?

A. Why one train runs faster than another. I don't know that I am able to determine the speed of a train by seeing it move along a portion of track. This train was running fast. I am not able to determine approximately the speed of a train by observing it going out over that portion of the track. I can tell you if on the morning of this accident this train was moving more or less than fifty miles an hour. At the time I saw it coming down there it was not running more than fifty miles an hour.

Off and on I have worked on the Wabash about two years, pretty near steady.

72 What was the speed of this train on the morning of the accident, just prior to the time it went into the ditch, I don't know. My opinion is between 45 and 50 miles an hour. When I say I can't tell the speed of a train I mean I can't tell exactly. I can't tell, and you can't tell how fast a train is running.

Q. Do you recollect a heavy rain and snow storm on May 3d, 1907?

A. No, I don't believe I do.

Mr. BECKER: I stop reading on page 57, middle of the page, at "A. No, I don't believe I do."

Judge KENEFICK: I want to read the part of the examination that my friend has omitted. (Reading balance of direct and the cross-examination.)

Q. Do you read the Norborne Democrat?

A. No, I never read it; I'm a Republican.

Q. I will show you what purports to be a copy of the Norborne Democrat, issued on May 10, 1907. Do you recollect of that being published in this city?

A. Yes, sir.

Q. I wish to read from this paper and ask if this does not refresh your recollection in reference to this snowstorm:

"Not within the memory of the oldest inhabitant has there been a more disagreeable May day than that experienced by the people of Missouri Friday, May 3rd.

In the early morning hours rain began to fall, and later on turned into a snowstorm, the like of which is only experienced in the winter months."

Q. Does that refresh your recollection?

A. No, sir.

73 Cross-examination by defendant's counsel, read by Judge KENEFICK:

I have had no experience on railroads other than as a section hand. I have timed freight trains with a watch, when just riding on them, from mile-post to mile-post. I never stood on the ground and watched a train go by and timed it with a watch. When I said that in my opinion the train was going 45 or 50 miles an hour, it is simply guess. I didn't time it at that time. I didn't have time to time trains then. I was standing when I first saw that train on the side of the dump on the ground, on the Wabash track. I watched the train from the time I first saw it until the accident.

Q. What was there strange or peculiar in the approach of this train that made you stop and watch it?

A. Well, just because Mr. Burge said something about it. I always watch trains approaching. That is, when a train is going by on either track I stop my work and watch it.

I have said, on direct-examination, that I observed a flag on the Santa Fe tracks on the morning of the accident. That was located east of the wreck; how far I don't know. The flag was yellow. I am positive to my satisfaction and I want my testimony to stand in this case that there was such a flag there before this accident, at about 7 o'clock. I saw it after 7 o'clock; we left the tool house at 7 o'clock. It took us to get to the place from the tool house about ten minutes. That is, I saw this flag about 7.10 or 7.15. On the morning of May 6th, 1907, I left the tool house which is near the depot here in Norborne, and I went west and I saw a flag located on top of the hill, probably a quarter—about a half a mile west. On the morning of May 6th I went from the tool house, and that
74 first stop I made was about a mile and a quarter west. That morning of the accident I did not return east again. The only time before this accident that I saw the flag in question was about 7.10 o'clock. I didn't see the flag after that and before the accident. I saw it at 6 o'clock when we came back. I saw the flag only two times that day. That is all; about 7.10 and at 6 o'clock. I was positive that there was such a flag there on this day. I cannot be mistaken.

Redirect examination by plaintiff's counsel read by Mr. BECKER:

I could not tell approximately the distance between the Santa Fe track and the Wabash track at the point where this wreck occurred. My best opinion is 150 or 200 feet.

Mr. AUGUST HANKS, of lawful age, being first duly sworn, upon his oath testified as follows:

Direct examination by plaintiff's counsel read by Mr. BECKER:

My full name is August Hanks. I am employed at present by the Santa Fe Railway Company. I have been engaged in the employ

of the Santa Fe Railway Company about six years, off and on. I have not done any other railway work other than that. I am employed as foreman at the present time. I was employed in May, 1907, as section foreman of Section No. 11 C. That is immediately west of Norborne. I recollect the occasion of a wreck on the Santa Fe on May 6th, 1907. That train was supposed to be No. 1. No other trains were operated over the Santa Fe tracks at that time. I think I noticed the train after the wreck. It had a Santa Fe engine.

75 I never noticed the passenger coaches, how they were marked. I am certain it was a Santa Fe engine. I never noticed the express car. I never paid no attention whether or not there was an express car. I had charge of that particular portion of track where this wreck occurred. At that time I was familiar with the various flags used by the Santa Fe Railway Company. They indicate to the operator of trains the manner in which they should operate and the speed they should use. The different colors of flags were red, yellow and green. The red flag indicated danger. The yellow flag indicated caution. It was a slow order flag. I recollect the character of the day on May 6th. It was damp and cool. The sun was not shining. There had been rains prior to that day. There was not any fog on May 6th that I remember of. I remember the heavy rain and snow fall, but do not remember whether it was before or after the accident. Prior to this accident I had made a request for ballast to use upon my section of track. The use I intended to make of the ballast I asked them to furnish me was, I intended to keep up the track. The period of time prior to this accident I had been asking my employers and officials of the Santa Fe Company for ballast was probably three months. I cannot say how much ballast during that time they delivered to me for that section; didn't keep no record. I went by the place where this train was subsequently ditched on May 6, 1907, with my gang of section men.

Cross-examination by defendant's counsel read by Judge KENEFICK:

I say I went by the place of the accident on the morning of May 6th. I started out that morning from the tool house and went west about four miles. It took me by the point of the accident. The tool house of the Atchison, Topeka & Santa Fe is right opposite the tool house of the Wabash, about two hundred feet away. I say I started about 7 o'clock in the morning from the tool house. I did not see the gang on the Wabash start out that I know of. I did not on my trip west observe any flag of any color, between the tool house and the place of the accident; none whatever. If there had been a flag there I would have noticed it. I did not on that morning give any orders for a flag to be located between the tool house and the point of the accident. If anybody gave the orders for the placing of a flag at the point between the tool house and the place of the accident it would be the roadmaster. He would not place it there himself. He would give the order to the section hands; that is, to me. No such orders were given me that morning. As I traveled west that morning I noticed the track as I went along.

I observed the condition of the track at the point of the accident on the morning of May 6th and prior to the accident as I went along. I did not notice anything peculiar about the track at that time. The track was not very well ballasted. I had some few cinders on it. I think two rails were low on the north and one rail low on the south, but I don't know just how long they were. The custom of the Santa Fe Railway Company at and before the time of the accident with reference to ballasting its track in between the ties was, they had been dressing it full in the center and sloping out side to about two inches to the bottom of the ties, to drain it. That was the custom that was used on the track at the point of the accident. I had repaired the track at the point of the accident a short time before the accident, probably two or three days. I left the track at that time in first class condition, with what I had to do it with.

77 Redirect examination by plaintiff's counsel read by Mr. BECKER:

Our ties such as was used in the construction of this track at the place of the accident were about eight inches thick. At the time of this accident the ballast was full in the center of the track. It came up on the ends of the ties at the outside, about two inches from the bottom.

Q. Is that the way you mean you ordinarily constructed the track or is that the way you mean this track was constructed at the time of this accident?

A. It was all that way.

I didn't have very much ballast to use on the morning of this occurrence, at the time, at this place. Ordinarily I constructed the track, with reference to the ballast, if I had had sufficient amount of ballast, at the time and prior to this occurrence, having it higher in the center of the track, sloping to the sides. Normally the ballast, if I had sufficient amount of ballast, was good and full on the inside, probably two inches above the top. On the outside I had it about two inches from the bottom. But on the morning of the accident, the ballast of this particular portion of the track was full in the center. At this time it was level at the top of the ties. Then it came down to two inches on each side of the ties. The ballast I had at that time was cinders.

Redirect examination by plaintiff's counsel read by Mr. BECKER:

I looked on the morning of this accident, at the place where the train subsequently left the track, with reference to the condition of the ballast. I looked back after I went over it, on the hand
78 car. I came back to this place after the accident. What portion of it was torn up, I don't know exactly. 425 new ties was what we replaced, by reason of this accident; about 22 ties to the rail. The rails were 33-foot rails. When I arrived at the scene of the accident and subsequent to the wreck, I saw the cars in the ditch. I don't know how many. The cars I saw in the ditch were, baggage car, chair car, smoking car, and I don't know what kinds—

I did not notice an express car. I don't know exactly how far from the line of the track these cars were that were in the ditch; probably 30 feet from the outer edge of them. I did not examine the condition of the track there to determine the place where the train first left the track. The condition of the ground where the cars struck the ground as they went into the ditch was, the ties were cut into and some rails were broken. In the ditch one of the cars butted into the ground; how deep I don't know; probably two or three feet, maybe more. I don't know how far it plowed into the ground. It may have been less than two or three feet; may have been as small as one foot. I believe about one foot. In repairing the track we used 425 ties. The ties that I replaced were torn, cut and damaged so that they could not possibly be used by reason of this accident. The biggest part of them were.

NOAH BURNETTE, of lawful age, being produced, sworn and examined on the part of plaintiff, testified upon his oath as follows:

Direct examination by plaintiff's counsel read by Mr. BECKER:

My full name is Noah Burnette. I was employed in May, 1907, by Mr. Burge, working for the Wabash as section hand. I 79 remember the occasion of No. 1 Santa Fe running into a ditch west of Norborne, on the 6th of May, 1907. I was working about 200 feet from that place across on the Wabash tracks. I recollect prior to May 6th of heavy rain or snow storm that visited this vicinity on May 3d. The nature of that storm was rain and snow. It was pretty severe. It snowed about twelve hours, I think. On May 6th I first observed this train going down on the Santa Fe track about a quarter of a mile from the place of the wreck. From the time I observed that train from a quarter of a mile from the place of the wreck, I continued to observe it up to the time it went into the ditch. I never paid no attention to the speed of it. I have been engaged in railroading twelve years. During that time I have had no occasion to observe the speed of trains, but I have. I have observed the speed of trains and their motion. I am not able, by my experience in this connection, to tell approximately, not definitely or accurately, the speed of a train by observing it. I could guess at it. As I observed this train coming down that morning I am able to state whether or not it was going more than fifteen miles an hour. I think it was. The train was moving fast. It was going more than thirty miles an hour. It was going more than fifty miles an hour. I think it was going as much as sixty miles an hour.

Cross-examination by defendant's counsel read by Judge KENEFICK:

I did not see a slow order flag on the Santa Fe between the Santa Fe tool house and the point of the accident. If such a flag had been there, likely I would not have noticed it. I have been a section hand about twelve years.

80 Mr. HOYT: You stipulate, I suppose, Judge Kenefick, that these goods never were delivered or no part of them was ever delivered to the consignee or back to the plaintiff?

Judge KENEFICK: Yes.

Mr. BECKER: I suppose it is admitted that a notice was served on you in due time in accordance with the requirements of the bill of lading?

Judge KENEFICK: Well, we make no question as to proof of claim being served within the prescribed period at all.

Mr. BECKER: Admitted as we requested. We rest.

It is stipulated that the value is \$15,487.06.

(Mr. Becker states the value in answer to a question of the Court.)

The COURT: And interest from May 6th, I suppose you ask?

Mr. BECKER: Yes.

Judge KENEFICK: Is this receipt book in evidence?

Mr. HOYT: No.

Judge KENEFICK: Well, we desire to offer it so far as we are concerned. Will you turn that over to the stenographer and have him mark it?

Exhibit 1 for identification marked in evidence as Exhibit 1.

It is stipulated after the trial that said receipt book may be submitted to any court of review upon writ of error or appeal or certiorari, without being printed in the bill of exceptions or annexed thereto.

Judge KENEFICK: If the plaintiff closes its case, we would like to make a motion at this time to strike out the testimony given as to the actual value of the shipment on the ground that the value is limited—or at least the damages are limited by the contents
81 of the shipping receipt and the contract as made. We desire to make that formal motion now so as to preserve the record.

The COURT: I will deny the motion, without passing on the question at the present time.

Judge KENEFICK: Yes, sir; we take an exception. And also the proof as to our knowledge of its being of a value in excess of a thousand dollars, would fall under the same ruling?

The COURT: Yes. Deny the motion.

[Defendant rests.]

Mr. PRIME: The defendant admits that plaintiff has suffered damages in the sum of \$50, the amount expressed in the shipping receipt, Exhibit "A." It concedes its liability in that sum, with interest, for the purpose of figuring a date, from the 7th day of May, 1907, the day of the accident, and submits to the Court the proposition that in view of the authorities both in the State of New York and United States Supreme Court in causes of this character, the Court is bound to hold the plaintiff to the terms of the agreement and dispose of the case by awarding, or directing the jury to award the plaintiff \$50 with interest from that date.

Does your Honor care to hear me on that subject now?

The COURT: Well, yes. You move for the direction of a verdict?

Mr. PRIME: That would be my motion, but Judge Kenefick thinks

that it is singular at least to have the defendant assume the position of asking the Court to direct a verdict in plaintiff's favor.

82 The COURT: The only question is as to the bill of lading applying in this case, confining the value to \$50.

Mr. PRIME: That is the only question in the case.

The COURT: Very well. I understand you.

Mr. PRIME: In that case we contend there is nothing to submit to the jury. Now that we have rested, if your Honor would rule finally on the motion to strike out testimony regarding value in excess of \$50—and in that connection, before you make your ruling, I call your attention to the fact that the Court in the Hart case to which I referred, which has been the ground-work of the rulings of other courts and federal courts on that subject since it was handed down, in 112 U. S. As I say, the trial Court there excluded the evidence on the subject of value in excess of \$50, which ruling was sustained by the U. S. Supreme Court, holding that the contract in writing merged any conversations and knowledge or anything else that preceded it, and that the agreement expressed therein must be held to control; and that is the situation which we contend exists here, and if that is sound, the testimony, which, of course, as it stands in this case is entirely uncorroborated, in the stipulation that was made, subject to our reserved objection, should be excluded.

The COURT: I do not think it makes any difference. Is there any question here—if I understand you admit the value to have been fifteen thousand and odd dollars, actual value of the property, and therefore if the limitation of \$50 is not the limitation they are entitled to recover fifteen thousand and odd dollars.

Mr. PRIME: That is the sole purpose of making that admission.

The COURT: It is agreed between both parties that is the only question: it is either the whole value, fifteen thousand or fifty dollars?

83 Mr. PRIME: Undoubtedly, sir. I beg your Honor to understand the fact that we made that stipulation absolutely for the purpose of avoiding the necessity of putting in proof on that subject.

The COURT: Certainly.

Mr. PRIME: We did not know at that time and there is no suggestion in the record that we knew that their property had any such value. There was no possible reason why we should know it had such a value. The stipulation, therefore, should not be taken as suggesting that we had any knowledge of that character. It is a present stipulation, not a stipulation as of May 3, 1907.

Mr. HOYT: That is not entirely the situation.

The COURT: It is obvious that you knew what was shipped was 4 automobiles and parts connected with them that they were of considerable value.

Mr. PRIME: Undoubtedly, sir.

The COURT: I will hear the other side on the question of why this \$50 clause does not apply, or I will hear you. My impression was that such a provision in a shipping receipt was valid unless there

were peculiar circumstances to take the case out of the general rule, but I will hear the other side about that.

Mr. Hoyt and Mr. Becker address the Court in behalf of plaintiff, and Mr. Prime follows in behalf of defendant.

The Court (orally): I think, Mr. Prime, that it is hardly necessary to take any more time in this matter. This question, of course, of the right of a common carrier to limit the amount of a recovery to a fixed sum has been the subject of perhaps as much litigation as any other single question in the law. It is now well settled by the authorities in the State of New York, and in the federal courts, that a carrier and a shipper can make an agreement by which they fix a valuation of property shipped, and agree that the valuation shall be

84 the valuation of the property, unless they state the value at the time of shipment, the actual value. The contracts are usually contained in these forms of bills of lading or shipping receipts, and questions often arise whether the party that has taken such a receipt has read the fine print on them. Such a contract may have an element of deceit about it. On the other hand, in the case of a shipment of valuable property, such as diamonds for instance, concealed in a box, a question often arises whether the express company has not acted under some mistake or fraud. Most of the cases involve either questions of that kind or questions whether the shipper has not been induced to ship under the ordinary shipping receipt, while relying upon the ordinary common law liability of the carrier. But it seems that in this case there is not anything of that sort. This is a case in which the shipper voluntarily and intentionally made the contract in the terms stated in the shipping receipt. The shipping clerk called as a witness showed that he was familiar with the provisions of the form limiting the liability to fifty dollars. It seems that the officers of the plaintiff had concluded to ship by express and not by freight, and that they had concluded not to state the value. It does not make any difference what their purpose was. But it is perfectly obvious that they decided not to state a value, so as to get a lower rate. Now, it is not of any particular consequence why they should decide to do that. The company might conclude that the risk of loss on shipments by express was so slight that upon the whole they would make a profit by taking that risk, meeting an occasional loss when it occurred, or they might conclude that they could insure in regular insurance companies at a cheaper rate than the difference between the price of transportation of their goods valued at fifty dollars and the price if they declared

85 the actual value. At all events, they decided to do so, so that in this case there is no element of deceit or mistake. They elected to make just such a contract as was made on the face of the shipping receipt. The general rule, therefore, applies that the acceptance of that bill of lading or shipping receipt made the contract; particularly as the attention of the shipper was called to the statement contained on its face, "value was asked and not declared," and he answered as to that, that it was all right. The question whether the goods were insured, of course was a matter of importance to Wells, Fargo & Company. If they were to be held liable

for their full common carrier's liability they would naturally want to insure the goods. When attention was called to the question of declaring the value, the shipper declined to state any value, and paid the rate fixed for goods of the value of fifty dollars, and said the goods were insured. Under those circumstances it seems to me that there is no question but that the ordinary rule should apply.

Mr. BECKER: If the Court please, before your Honor formally rules—I take it that you have not formally ruled as yet—I should like to ask to go to the jury on all the questions of fact in the case; I should like to go to the jury on the question whether the defendant had notice and knew of the actual value of the shipment being largely in excess of the amount stated.

The COURT: They admit that they had. That was fully admitted by counsel, and it is perfectly apparent on the face of the transaction.

Mr. BECKER: That is merely preliminary to the next point I wish to ask to go to the jury on.

The COURT: Yes.

Mr. BECKER: That is the question of whether the limitation of liability embodied in the bill of lading was a reasonable and just one.

86 I ask to go to the jury also on the question of whether the alternative offered in the bill of lading, in case we should pay an additional valuation, was such a reasonable and just one that any part of the bill of lading can be sustained as not contrary to public policy.

I ask also to go to the jury on the question of whether the defendant did not convert, under the cause of action for conversion stated in the complaint, the property of the plaintiff, inasmuch as it by no means appears in this case that the shipment was totally destroyed. In fact, the contrary appears.

On the further ground that the bill of lading does not contain any stipulation whatever against conversion, although it does contain against loss, damage or destruction.

I ask also to go to the jury on the question of whether the shipper assented to the provisions of the bill of lading within the requirements of law for such an assent.

The COURT: I will deny the motion. I direct a verdict in the case of fifty dollars and interest.

Mr. BECKER: I desire to except to the denial of the motion to go to the jury. Your Honor will permit me an exception?

The COURT: Yes, to the denial as to each and every separate grounds.

Mr. BECKER: I also desire to except to the direction of a verdict for the sum of Fifty Dollars, not on the ground that the allowance of interest is improper, but on the ground that the amount for which the verdict is directed is improper and insufficient.

Mr. BECKER: I also desire, after the verdict is rendered, to ask for a stay and for an order extending the term three months, to permit the plaintiff to make a bill of exceptions.

87 The COURT: Yes, you may have such a stay after the entry of judgment. Enter an order extending the term for three months, with a stay of three months.

The jurors that are not seated in the jury box will please take their seats so that I may direct a verdict.

Whereupon the Court directed a verdict against the defendant for Fifty Dollars and interest from May 7, 1907.

And now in furtherance of justice, that right may be done, the plaintiff presents the foregoing as its bill of exceptions in this case and prays that the same may be settled and allowed, and signed and certified by the Judge as provided by law.

It is hereby stipulated that the foregoing bill of exceptions is a true record of all the testimony and proceedings in the trial of the above case and may be signed and settled by the Judge this 19th day of September, 1910, the term of Court at which the trial and judgment herein were had having been duly expended pursuant to stipulation by order of this Court to and including the 29th day of September, 1910.

KENEFICK, COOKE & MITCHELL,
Att'ys for Def't-Resp't.

88 United States Circuit Court, Western District of New York,
May Term, 1910.

GEORGE N. PIERCE COMPANY, Plaintiff,
vs.
WELLS FARGO & COMPANY, Defendant.

This cause having been brought on regularly before this Court on this 19th day of September, 1910, upon the application of the plaintiff upon the application of the defendant for the settling and certifying of this proposed bill of exceptions and the time for such settling and certifying having been duly extended by orders of the Court, and by the stipulations of the parties until and including this day, and the parties having agreed together in respect to said proposed bill of exceptions.

Now, therefore, on motion of Messrs. Hoyt & Spratt, the plaintiff's attorneys, it is

Ordered, that said proposed bill of exceptions be and it hereby is settled as the true bill of exceptions in this cause and that the same as so settled be and now hereby is certified accordingly by the undersigned, the Judge of this Court, who presided at the trial of this cause and that said bill of exceptions when so certified be filed by the Clerk.

GEO. C. HOLT,
*United States District Judge Before
Whom This Case was Tried.*

89 (Endorsed:) Circuit Court of the United States, for the
Western District of New York.—George N. Pierce Company,
Plaintiff, vs. Wells Fargo & Company, Defendant.—Plain-

tiff's Bill of Exceptions.—Due and personal service of the within Bill of Exceptions is admitted this 5th day of August, 1910.—Kenefick, Cooke & Mitchell, Attorneys for Defendant.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Sep. 21, 1910.—Harris S. Williams, Clerk.

United States Circuit Court, Western District of New York.

GEORGE N. PIERCE COMPANY, Plaintiff,

vs.

WELLS FARGO & COMPANY, Defendant.

To the Honorable Judges of the United States Circuit Court of Appeals, Second Judicial District:

Now comes the above-named plaintiff by its attorneys Hoyt & Spratt, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above entitled cause in said United States Circuit Court for the Western District of New York at the May term thereof, 1910, against said plaintiff on the 1st day of June, 1910, manifest error hath happened to the great damage of said plaintiff.

90 Wherefore, said plaintiff prays for allowance of said writ of error in said cause and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals, Second Judicial District.

Dated October 22, 1910.

HOYT & SPRATT,
Attorneys for Plaintiff.

Allowed. ~

GEO. C. HOLT,
United States District Judge.

(Endorsed:) U. S. Circuit Court, Western District of N. Y.—George N. Pierce Company vs. Wells, Fargo & Company.—Petition.—Hoyt & Spratt, Attorneys for Plaintiff, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Nov. 4, 1910.—Harris S. Williams, Clerk.

United States Circuit Court, Western District of New York.

THE GEORGE N. PIERCE COMPANY, Plaintiff,

vs.

WELLS FARGO & COMPANY, Defendant.

Assignment of Errors.

91 Now comes the plaintiff, George N. Pierce Company, and files the following assignment of errors, upon which it will rely its prosecution of the writ of error in the above entitled cause:

I.

That the trial court erred in overruling the objection of counsel for plaintiff in error to the evidence offered by the defendant in error to the effect that the witness Hochreiter had in his possession books of blank shipping receipts of express companies other than the defendant.

II.

That the trial court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness Hochreiter by counsel for defendant in error on cross-examination. "And therefore you did not declare; did not ——?" and in admitting in evidence over the objection of plaintiff in error proof that the witness Hochreiter had stated to defendant's agent that the shipment of automobiles and parts in question was insured by the plaintiff.

III.

That the trial court erred in denying the motion of counsel for plaintiff in error to strike out the evidence mentioned in the last assignment and all like evidence.

IV.

That the trial court erred in granting the motion of defendant in error to strike out the evidence of the witness Harry Burge: "I understand that there was a slow order out."

V.

That the trial court erred in granting the motion of counsel for defendant in error to strike out the evidence of the witness George Parry "Probably extended something like one thousand feet."

VI.

That the trial court erred in excluding the evidence of the witness George Berry, offered by plaintiff in error as follows: "Q. State whether or not the sag in the track was because you had sufficient ballast at that place?"

VII.

That the trial court erred in denying the motion of the plaintiff in error to go to the jury on the question of fact whether the alternative ordered in the bill of lading in case plaintiff should pay an additional valuation was such a reasonable and just one that any part of the bill of lading can be sustained as not contrary to public policy.

VIII.

That the trial court erred in denying the motion of the plaintiff in error to go to the jury on the question of fact whether the defendant did not convert the property of the plaintiff inasmuch as it by

no means appears in this case that the shipment was totally destroyed; in fact the contrary appears.

IX.

That the trial Court erred in denying the motion of the plaintiff in error to go to the jury on the question of fact whether the defendant did not convert the property of the plaintiff on the further ground that the bill of lading does not contain any stipulation whatever against conversion, although it does contain against loss, damage or destruction.

93

X.

That the trial Court erred in denying the motion of the plaintiff in error to go to the jury on the question of fact whether the shipper assented to the provisions of the bill of lading within the requirements of law for such an assent.

XI.

That the trial Court erred in denying the motion of the plaintiff in error to go to the jury on the question of fact whether the limitation of liability to fifty dollars embodied in the bill of lading was a reasonable and just one, the defendant having notice and knowing of the actual value of the shipment being largely in excess of the amount stated.

XII.

That the trial Court erred in denying the motion of the plaintiff in error to go to the jury on all the questions of fact in the case.

XIII.

That the trial Court erred in directing a verdict in favor of the plaintiff for only fifty dollars and interest on the ground that the amount for which the verdict was directed was improper and insufficient.

XIV.

That the judgment entered in pursuance of such direction of said verdict is erroneous, contrary to the evidence and contrary to the law of this case, in that the amount for which said judgment was rendered is improper and insufficient.

Wherefore the said George N. Pierce Company, plaintiff in error, prays that the judgment of the Circuit Court of the United States in and for the Western District of New York be reversed, and that judgment be directed for the plaintiff in the sum of Fifteen thousand four hundred and eighty-seven dollars and six cents (\$15,487.06), with interest from May 7, 1907, together with the costs of this action; or that a new trial be granted with costs.

HOYT & SPRATT,

*Attorneys for Plaintiff in Error,
Plaintiff in the Lower Court.*

(Endorsed:) U. S. Circuit Court, Western District of N. Y.—The George N. Pierce Company vs. Wells, Fargo & Company.—Assignment of Errors.—Hoyt & Spratt, Attorneys for Plaintiff, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Nov. 4, 1910.—Harris S. Williams, Clerk.

United States Circuit Court, Western District of New York.

GEORGE N. PIERCE COMPANY, Plaintiff,
vs.
WELLS-FARGO & COMPANY, Defendant.

Whereas, the above-named plaintiff, George N. Pierce Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit to reverse the judgment in the above-entitled cause in the Circuit Court of the United States for the Western District of New York.

Now, therefore, National Surety Company, a domestic corporation, having an office and principal place of business at No. 115 Broadway, in the City of New York, N. Y., does hereby, pursuant to the statute in such case made and provided, undertake in the sum of two hundred and fifty dollars (\$250) that the said plaintiff will pay to the said defendant all damages and costs if it fails to make its appeal good, and the condition of this obligation is such that if the above-named plaintiff shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Dated Buffalo, N. Y., September 14th, 1910.

NATIONAL SURETY COMPANY,
[SEAL.] By EDWARD A. KING,

Attorney-in-Fact.

Approved as to form and sufficiency.

GEO. C. HOLT, U. S. J.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

On this 14th day of September, 1910, before me personally appeared Edward A. King, Attorney in Fact of the National Surety Company, a New York corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the City of Buffalo, that he is the Attorney in Fact of the said National Surety Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to the within instrument is such corporate seal, and that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto as Attorney in Fact by like order, and deponent further says that the liabilities of said Company do not exceed its assets, as ascertained in

the manner provided in Section 3, Chapter 720, of New York Session Laws of 1893.

LOUISE PORTER,
*Commissioner of Deeds in and for the
City of Buffalo, N. Y.*

Copy of By-Law.

Be it remembered, That at a meeting of the Board of Directors of the National Surety Company, duly called and held on the fourth day of February, A. D. 1908, a quorum being present, the following by-law was adopted:

Article XII. Resident Officers and Attorneys-in-Fact.

SEC. 1. The President, or Vice-President, may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for, and on behalf of, the Company, and either the President, First Vice-President, the Board of Directors or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and authority given him.

SEC. 4. Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute for and in the name and on behalf of the Company any and all bonds, recognizances, contracts of indemnity and other writings, obligatory in the nature of a bond,
97 recognizances or conditional undertaking, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary.

I, Edward A. King, Resident Assistant Secretary of the National Surety Company, have compared the foregoing copy of By-Law with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of Sections 1 and 4 of said By-Law.

Given under my hand and the seal of the Company at Buffalo, N. Y., this 14th day of September, 1910.

[SEAL.]

EDWARD A. KING,
Res. Assistant Secretary.

(Endorsed:) U. S. Circuit Court, Western District of N. Y.—George N. Pierce Co., Plaintiff, vs. Wells-Fargo & Co., Defendant.—Copy.—Undertaking on Appeal.—Hoyt & Spratt, Attorneys for Defendant, office and post-address, 77 West Eagle Street, Buffalo, New York.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Nov. 4, 1910.—Harris S. Williams, Clerk.

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Second Circuit, Greeting:

Because, in the record and proceeding, as also in the rendition of the judgment of a plea which is in the Circuit Court before you between the George N. Pierce Company, plaintiff in error, and Wells Fargo & Company, defendant in error, a manifest error hath happened, to the great damage of said George N. Pierce Company, plaintiff in error, as by their complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second District, together with this writ, so that you have the same at the City of New York in the State of New York on the 30th day of November, 1910, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Justice of the Supreme Court of the United States, the 31st day of October, in the year of our Lord one thousand nine hundred and ten.

Attest my hand and seal of the United States Circuit Court for the Western District of New York at the Clerk's office at Buffalo, N. Y., on the day and year last above written.

HARRIS S. WILLIAMS,
*Clerk United States Circuit Court
for the Western District of New York.*

Allowed this 27 day of October, 1910.

[SEAL.]

GEO. C. HOLT,
*Judge of the United States District Court of the
Southern District of New York, before Whom
this Case was Tried.*

(Endorsed:) U. S. Circuit Court, Western District of N. Y.—George N. Pierce Company vs. Wells Fargo Company.—Original.—Writ of Error.—Hoyt & Spratt, Attorneys for Plaintiff, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Nov. 4, 1910.—Harris S. Williams, Clerk.

100 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to Wells, Fargo & Company, and Kenefick, Cooke, Mitchell & Bass, its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Second Circuit, to be held in the City of New York, in the State of New York, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Western District of New York, wherein the George N. Pierce Company, the plaintiff in error, and Wells, Fargo & Company, is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness The Honorable John M. Harlan, senior Justice of the Supreme Court of the United States of America, this 27th day of October, 1910.

[SEAL.]

GEO. C. HOLT,
*United States District Judge Before
Whom This Case Was Tried.*

Attest:

HARRIS S. WILLIAMS, *Clerk.*

(Endorsed:)—U. S. Circuit Court, Western District of N. Y.—George N. Pierce Company vs. Wells, Fargo & Company.—Original Citation.—Hoyt & Spratt, Attorneys for Plaintiff, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.—U. S. Circuit Court, Western Dist. of N. Y.—Filed Nov. 4, 1910.—Harris S. Williams, Clerk.

101 United States Circuit Court, Western District of New York.

GEORGE N. PIERCE COMPANY

vs.

WELLS, FARGO & COMPANY.

Upon application of Hoyt & Spratt, attorneys for George N. Pierce Company, plaintiff and plaintiff-in-error herein, it is hereby ordered that the time to prepare, certify and file the transcript of record herein be and the same is hereby extended to and including the 6th day of December, 1910.

Dated November 26, 1910.

GEO. C. HOLT, *U. S. Judge.*

UNITED STATES OF AMERICA,

Western District of New York, ss.:

I, Harris S. Williams, Clerk of the Circuit Court of the United States for the Western District of New York, do hereby certify the foregoing to be a transcript of the records of the Circuit Court, in

the cause named at the beginning thereof, made up pursuant to Rule XIV of the Rules of the United States Circuit Court of Appeals for the Second Circuit.

I do further certify that the cost of making the said transcript of record was \$24.50.

In testimony whereof I have hereunto signed my name and caused the seal of the said Court to be affixed at the City of Buffalo, in said District, the 3rd day of December, Anno Domini 1910.

[SEAL.]

HARRIS S. WILLIAMS,

Clerk U. S. Circuit Court, Western District of New York.

102 United States Circuit Court of Appeals for the Second Circuit.

THE GEORGE N. PIERCE COMPANY, Plaintiff in Error,

vs.

WELLS FARGO & COMPANY, Defendant in Error.

Argued April 19, 1911. Decided May 18, 1911.

In Error to the Circuit Court of the United States for the Western District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges.

WARD, *Circuit Judge*:

The plaintiff, a manufacturer, brought this action at law to recover of the defendant, an express company, the value of a carload of automobiles and appurtenances which it had delivered to the defendant to be carried from Buffalo to San Francisco. The defendant admitted its liability and the trial judge directed the jury to find a verdict in favor of the plaintiff for \$50, the agreed value of the shipment, with interest and costs. The plaintiff took out this writ of error to the judgment entered on the verdict on the ground that the jury should have been directed to find a verdict for the actual value of the shipment, which was over the sum of \$15,000.

The bill of lading under which the goods were carried provided:

103 " * * * nor shall said company be liable for any loss of or damage to said property in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said Company or its servants; nor in any event shall said Company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued, unless a different value is hereinabove stated * * * "

The goods were fully described in writing with the additional statement, "Value asked and not declared." The plaintiff had large experience in shipping its product both by railroad companies and by express companies. It was entirely familiar with shipping receipts and bills of lading and had books containing the forms of various

companies, including the defendant. It had been in the habit of putting valuations upon its express shipments but changed its practice before the shipment in question was made. Its shipping clerk read the bill of lading for this shipment, was asked by the defendant's agent whether he wished to put a valuation on the goods and declined to do so. He knew that if he did so the amount of freight payable would be increased. The plaintiff's representative on the Pacific Coast had got the rate for this particular shipment and had advised the plaintiff what it would be.

Thus the agreement was deliberately made with full knowledge of all the facts. The parties dealt with each other on perfectly fair open and even terms. Although the valuation was obviously much below the real value, the plaintiff thereby got the benefit of paying less freight and the defendant the benefit of limiting, not its liability, but the amount of its liability for negligence.

There is nothing against public policy in the first clause above quoted. The Federal courts recognize no difference between gross and ordinary negligence. *Railway Co. vs. Arms*, 91 U. S., 489. In all cases negligence is failure to exercise the care appropriate to the circumstances of the particular case. Greater care is called for in transporting eggs than in transporting pig iron. Therefore the clause, though it exempts the defendant from its liability as insurer, which is lawful, does not exempt it from the consequences of its own fraud or negligence, which would be unlawful as against public policy. It remained liable for its negligence to the full amount agreed upon. Such a contract is valid in the Federal courts. The Supreme Court has definitely so decided in *Hart vs. Pennsylvania Railroad Co.*, 112 U. S., 331. In that case twelve race horses were value at \$200 each, one of which was worth \$15,000 and the others from \$3,000 to \$3,500 each. Mr. Justice Blatchford said:

"Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the values named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight.

It is further contended by the plaintiff, that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between

a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper.

105 But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with the public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

"The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued.

The distinct ground of our decision in the case at bar is, that where a contract of the kind signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or

106 damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Squire vs. New York Central R. R. Co.*, 98 Mass., 239, 245, and cases there cited."

There can be no objection to a carrier's using printed bills of lading which fix a value for all packages unless a greater value is stated by the shipper and more freight paid. If it could not do this a negotiation and a chaffering would be necessary as to the value of each article tendered for shipment whose freight depended at all

upon value, before the document could be delivered. A satisfactory or profitable transaction of business would be impossible. In the present case, however, as in the Hart case, the shipper gave his positive assent.

The plaintiff in error relies upon *Calderon vs. Atlas Co.*, 170 U. S., 272 and *The Kensington*, 183 U. S., 263. They are not applicable. In the *Calderon* case the bill of lading, as construed by the Supreme Court, exempted the carrier from any liability whatever for packages over the value of \$100 each. Mr. Justice Brown recognized the right of the carrier to limit his liability:

"Acting upon this view, it was held that the liability of the respondent was limited to \$100 per package, following in this particular the rulings of this court in *Railroad Company vs. Fraloff*, 100 U. S., 24, 27, and *Hart vs. Pennsylvania Railroad*, 112 U. S., 331, and the principle announced in *Magnin vs. Dinsmore*, 56 N. Y., 168; S. C., 62 N. Y., 35; 70 N. Y., 410; *Wescott vs. Fargo*, 61 N. Y., 542, and *Graves vs. Lake Shore & Mich. Southern Railroad*, 137 Mass., 33. In this last case the rule obtaining in this court is adopted to its full extent by the Supreme Judicial Court of Massachusetts. In these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in

107 case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. See also *Ballou vs. Earle*, 17 R. I., 441; *Richmond & Danville Railroad vs. Payne*, 86 Virginia, 481; *J. J. Douglas Company vs. Minnesota Transportation Co.*, 62 Minnesota, 288."

But he went on to say that the contract properly construed relieved the carrier of any liability whatever, which was of course void:

"In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding \$100 in value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed. If the language had been ambiguous we might have given it the construction contended for, which probably conforms more nearly to the clause ordinarily inserted in such cases, but such language is too clear to admit of a doubt of the real meaning."

In the *Kensington* case the limitation was held invalid because the alternative offered to the passenger of a higher valuation for a higher freight was that she should ship her baggage under a bill of lading. This would have brought it within the Harter Act, which relieves the carrier from any liability for errors of navigation or management by its servants and so was unfair. The words with

which Mr. Justice White concluded his opinion show that the court did not intend to depart from its ruling in the Hart case, *supra*:

“In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ
108 transatlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received, under circumstances disclosed by the record, gave rise to a contract embracing the exception to the carrier's liability, which *were* stated on the ticket. We intimate no opinion on the subject.

It is also suggested that the fixing of a value lower than the real value is in violation of sec. 10 of the Interstate Commerce Act of February 4, 1887, as amended, but being the same for all shippers, there can hardly be said to be any discrimination.

This court is definitely committed to the proposition that a common carrier may by contract limit the amount of his liability for his negligence, *Bachman vs. Clyde Steamship Co.*, 81 C. C. A. 529; *Hohl vs. Norddeutscher Lloyd*, 175 F. R., 544. And we think it would be in the highest degree violative of public policy to permit a shipper who has pecuniarily benefited by the valuation he has deliberately agreed upon, to repudiate his agreement and recover against the carrier on a higher valuation. The judgment is affirmed.

A. L. Becker, for the Plaintiff-in-Error.

W. C. Prime, for the Defendant-in-Error.

109 United States Circuit Court of Appeals for the Second Circuit.

THE GEORGE N. PIERCE COMPANY, Plaintiff in Error,
vs.

WELLS FARGO & COMPANY, Defendant in Error.

Argued April 19, 1911. Decided May 18, 1911.

In Error to the Circuit Court of the United States for the Western
District of New York.

Before Lacombe, Ward and Noyes, Circuit Judges.

NOYES, *Circuit Judge* (dissenting):

In upholding the right to contract many courts have gone so far as to rule that a common carrier may even stipulate for exemption from responsibility for its own negligence. But the Supreme Court of the United States has never accepted this view. In a series of decisions beginning with the great case of *Railroad Co. vs. Lock-*

wood, 17 Wall., 357, it has consistently held that any contract which excuses a common carrier from negligence in the performance of its duty is contrary to public policy and void.

The principles of public policy involved are broad. The law as administered by the federal courts will not permit a common carrier to abandon its obligations to the public. Still it has been contended

that while these considerations would forbid a carrier from
110 altogether relieving itself from liability, they should not prevent it from exempting itself if it offer the shipper the alternative of paying a greater rate and obtaining full liability. But the Supreme Court of the United States in *Calderon vs. Atlas Steamship Co.*, 170 U. S., 272, 282, after saying that contracts for exemption from all responsibility have been repeatedly held by it invalid as attempts to put off the essential duties resting upon carriers said:

"The difficulty is not removed by the fact that the carrier may render himself liable for these goods, if bills of lading are signed therefor with the value therein expressed, and a special agreement is made."

See also *The New England*, 110 Fed., 415, 419.

So it has been contended that while a carrier may not stipulate for its absolute release from liability for negligence, it may limit its liability to a certain sum in case of loss. But the weight of authority in this country is undoubtedly to the effect that the same principles of public policy which condemn total exemptions condemn such partial exemptions, and that such limitations, as distinguished from agreed valuations, are invalid. (See *Hutchinson on Carriers* §250.)

It is upon the theory of an agreed valuation that the majority of the court decide this case. It is said that the parties agreed that the valuation of property obviously worth about \$15,000 was \$50 and, consequently, that no more was recoverable although the property that was destroyed by the defendant's negligence.

Unquestionably the law makes a distinction between agreed valuations and mere limitations, and sustains the former. When shipper and carrier make a fair valuation of property offered for transportation with a rate of freight based thereon, a contract releasing the carrier from liability beyond the agreed amount will be sustained. Such agreements permit an adjustment of rate to liability and protect the carrier from fanciful and extravagant valuations. In the case of articles of doubtful or uncertain value, every presumption should be in favor of the valuation agreed upon. But the principle

because such agreements present a meeting of the minds of
111 the parties as to the fair value of the property, as distinguished from an arbitrary limitation of liability, that they escape condemnation by those considerations of public policy which we have noticed. I cannot concur in holding that a fictitious valuation, known by both parties to have no relation whatever to the real value of the property, is within the governing principle. In my opinion a valuation of \$50 upon \$15,000 worth of property—of known value to both carrier and shipper—is not a valuation at all but is an arbitrary and unreasonable limitation in the guise of a

valuation. If \$50 can be sustained as a valuation of this property, any sum may be named as the value of any property. While public policy declares that agreements which relieve a carrier from the effects of its negligence "are contrary to the fundamental principles upon which the law of carriers was established" nevertheless such exemption may be obtained by going through a form of words—by "valuing" the most valuable article at a penny!

Moreover the opinion of the majority not only says that the "valuation" in this case escapes the condemnation of principles of public policy, but goes further and states that it would be in the highest degree violative of those principles to permit a shipper to recover the full value of his property in the face of such a "valuation." But precisely the same thing could be said in the case of a shipper who enters into an agreement with a carrier, in consideration of a reduced rate of freight, to release the carrier from all liability for negligence. It has never been held inimical to public policy to permit a shipper to repudiate such an agreement although deliberately entered into for value. On the contrary, as we have seen, public policy requires such repudiation. The controlling consideration is not one of private right but of public interest.

The decision of the majority is based upon the opinion of the Supreme Court in *Hart vs. Pennsylvania Railroad Co.*, 112 U. S., 331, the gist of which, as I view it, is contained in the following paragraph:

"The distinct ground of our decision in the case at bar is that where a contract, of the kind signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by negligence of the carrier, the contract will be upheld as a proper and lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

As I construe this language it states the rule already noted: that a fair valuation—a valuation "fairly made"—between shipper and carrier will be sustained. While the language of some parts of the opinion is broad, I find nothing to indicate an intention upon the part of the Supreme Court to depart from those principles governing carriers which it had previously consistently maintained. There was not in the *Hart* case a fictitious "valuation"—an arbitrary sum having no relation whatever to the real value of the property. The valuation in the receipt of \$200 was undoubtedly a fair average valuation of a horse, and race horses which, probably more than any other class of property, are susceptible of "extravagant and fanciful valuations"—were shipped under it. The Supreme Court apparently held the valuation bona fide and sustained it for that reason. If the amount stated in the present receipt had been a fair average valuation of an automobile—say \$1,000—and these machines, although of greater value, had been shipped under it, there would be far more ground for contending that the decision in the *Hart*

case is applicable here. In view of the facts, the decision in that case seems not inconsistent with the views already expressed.*

For these reasons I am constrained to dissent in this case. I do so with diffidence and reluctance. The majority opinion is able and I appreciate that it is in accordance with the trend of the decisions in this Court. But if the principles of public policy which condemn agreements whereby carriers seek to put off their obligations to the public and exempt themselves from the consequences of their negligence means anything of substance, I strongly feel that they should be given an application broad enough to accomplish something. It would be better, as it seems to me, to hold that carrier and shipper may enter into such agreements as they see fit, than to deny the right to make a direct contract and permit the same result to be accomplished by indirection. It would be better to deny the existence of considerations of public policy than to insist that they are sound and while still insisting expressly approve an obvious and deliberate evasion of them.

In my opinion there was error in the judgment of the Circuit Court.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 29th day of May, one thousand nine hundred and eleven.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

GEORGE N. PIERCE COMPANY, Plaintiff in Error,

vs.

WELLS FARGO & COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

H. G. W.

*The decision of this Court in *Hohl vs. Norddeutscher Lloyd*, 175 Fed., 544, is in my opinion distinguishable from the present case in that there the value of the property was concealed. The shipment was a closed package containing hosiery. In the present case the value of the automobiles was well known.

115 Endorsed: United States Circuit Court of Appeals, Second Circuit. G. N. Pierce Co. vs. Wells Fargo & Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 29, 1911. William Parkin, Clerk.

116 UNITED STATES OF AMERICA,
 Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 115 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of George N. Pierce Company against Wells Fargo & Company, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of September in the year of our Lord One Thousand Nine Hundred and eleven and of the Independence of the said United States the One Hundred and thirty-sixth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The George N. Pierce Company is plaintiff in error, and Wells Fargo & Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be

certified by the said Circuit Court of Appeals and removed
118 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

119 [Endorsed:] File No. 22,878. Supreme Court of the United States, October Term, 1911. No. 802. The George

N. Pierce Company vs. Wells Fargo & Company. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 3, 1911. William Parkin, Clerk.

120 In the Circuit Court of the United States for the Second Circuit.

THE GEORGE N. PIERCE COMPANY, Plaintiff in Error,
vs.
WELLS-FARGO & COMPANY, Defendant in Error.

It is hereby stipulated by and between the above named parties that the certified transcript of record in the above entitled action, including the record of proceedings in the Circuit Court of Appeals heretofore made by the Clerk of said Circuit Court of Appeals and now on file with the Clerk of the Supreme Court of the United States, can be taken as the return of the Court of Appeals to the writ of certiorari herein granted by the Supreme Court, and dated the 26th day of October, 1911.

Dated November 4, 1911.

THE GEORGE N. PIERCE COMPANY,
By WILLIAM B. HOYT,
GEORGE E. HAMILTON,
JOHN W. YERKES,
JOHN J. HAMILTON,

Counsel.

WELLS FARGO & COMPANY,
By CHARLES W. PIERSON, *Counsel.*

121 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. The George N. Pierce Company, Plaintiff-in-Error, vs. Wells-Fargo & Company, Defendant-in-Error. Copy. Stipulation. William B. Hoyt, George E. Hamilton, John W. Yerkes, John J. Hamilton, Counsel for Plaintiff-in-Error. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 6, 1911. William Parkin, Clerk.

122 To the Supreme Court of the United States, Greeting:

Whereas, the record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of said court, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York November 6th, 1911.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of
Appeals for the Second Circuit.

123 [Endorsed:] 802/22878. United States Circuit Court of Appeals, Second Circuit. Geo. N. Pierce Co. v. Wells-Fargo & Co. Return to Certiorari.

124 [Endorsed:] File No. 22,878. Supreme Court U. S., October Term, 1911. Term No. 802. The George N. Pierce Company, Petitioner, vs. Wells Fargo & Company. Writ of certiorari and return. Filed November 13, 1911.

10
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1911~~ 1914

~~1804~~
~~487..~~
No. ~~802~~
14

Office Supreme Court, U. S.
FILED.

OCT 7 1911

JAMES H. McKENNEY,
CLERK.

THE GEORGE N. PIERCE COMPANY,
PETITIONER,

vs.

WELLS FARGO & COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT, AND
BRIEF IN SUPPORT OF THE SAME.

W. B. HOYT,
G. E. HAMILTON,
J. W. YERKES,
J. J. HAMILTON,
Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 802.

THE GEORGE N. PIERCE COMPANY, PETI-
TIONER,

vs.

WELLS, FARGO & COMPANY, RESPONDENT.

NOTICE OF PETITION FOR CERTIORARI.

Notice is hereby given that under and by virtue of the provisions of the Judiciary Act of March 3, 1891, and the amendments thereto, the undersigned, on behalf of the petitioner above named, will present the annexed petition for a writ of certiorari on the record in the above entitled cause to the Supreme Court of the United States, at the Capitol, in the City of Washington, on Monday, the 9th day of October, 1911, at the coming in of

court on that day, or as soon thereafter as Counsel can be heard.

Dated September 20, 1911.

WILLIAM B. HOYT,
GEORGE E. HAMILTON,
JOHN W. YERKES,
JOHN J. HAMILTON,
Counsel for Petitioner.

To Wells, Fargo & Company and to Alexander &
Green,

Of Counsel for Respondent.

Due and sufficient notice of the submission of
the annexed petition is hereby admitted.

Charles W. Pearson
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

THE GEORGE N. PIERCE COMPANY, PETITIONER,

vs.

WELLS, FARGO & COMPANY, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.***To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, The George N. Pierce Company, a corporation organized and existing under the laws of the State of New York, respectfully shows:

1st. That the cause was commenced in the Circuit Court of the United States for the Western District of New York, and the jurisdiction of said Court depended upon the diverse citizenship of the parties, and also upon the fact that one of the causes of action alleged in the complaint arose under a statute of the United States, to wit, Section 20 of the Interstate Commerce Act, as amended by the Act of June 29, 1906, Chapter 3591, Section 7, 34 Stat. at L. 593.

2d. The Court is asked to grant a writ of certiorari because the recovery of your petitioner for the loss or conversion of a shipment of four automobiles and parts, which the defendant undertook to transport from Buffalo, N. Y., to San Francisco, Cal., caused by the gross negligence of the defendant, has been limited to \$50.00 by virtue of a stipulation in the bill of lading, notwithstanding the actual value of said shipment was \$15,487.06 and the defendant knew at the time of said shipment said automobiles were of very large value. Your petitioner contends that the limitation of liability to \$50.00 was void as against public policy and as prohibited by Section 20 of the Interstate Commerce Act aforesaid.

That said Circuit Court of Appeals for the Second Circuit, in affirming the judgment of the Circuit Court for the Western District of New York, held that notwithstanding at the time of the shipment both parties knew that the sum of \$50.00 was not more than three-tenths of one per cent. of the actual, obvious and unconcealed value of the shipment, such limitation of liability could be sustained as a valuation of the property or stipulated liquidation of damages, rather than an exemption from liability for negligence resulting in the loss of all but \$50.00 of the value of the shipment, worth in excess of \$15,000. Said Court held further that although the alternative offered by said bill of lading was merely that upon payment of an additional sum "for valuation," liability of the carrier for its *gross negligence* might be secured, this was the equivalent of an opportunity

to purchase liability for ordinary negligence, inasmuch as the Federal Courts do not recognize any distinction between gross and ordinary negligence. Said Court also held that Section 20 of the Interstate Commerce Act aforesaid, which provides in terms that any common carrier shall be liable to the lawful holder of a bill of lading for any loss, damage or injury to the property caused by it, and that no contract, receipt, rule or regulation shall exempt such common carrier from the liability so imposed by such statute, did not affect the validity of the stipulation of the bill of lading, as such stipulation was a valuation of the property. Finally, the said Court held that Section 10 of the Interstate Commerce Act (Act of February 4, 1887, Chap. 104, 24 Stat. at L. 382, Act of March 2, 1889, Chap. 382, Sec. 2, 25 Stat., at L. 857), prohibiting false billing by means of which any person may obtain transportation for property at less than the regular rates then established, did not prohibit a deliberate and known under-valuation of the property to be carried by shipper and carrier, resulting in a rate less than that which would be charged were the actual and true value stated in the bill of lading.

That said cause was originally commenced in the Circuit Court of the United States for the Western District of New York.

That the complaint alleged that the defendant express company undertook as a common carrier to transport the plaintiff's shipment of four automobiles and parts from Buffalo, N. Y., to San Francisco, California. The shipment occurred

May 3, 1907. The shipment was never delivered at destination. After it had proceeded in an express car of the defendant as far as Western Missouri the passenger train in which it was being drawn was derailed and wrecked. The express car then caught fire and great damage was done to the shipment, although the automobiles, being largely composed of metal, were not totally destroyed. Notwithstanding the shipment was not totally destroyed and the metal frames remained, though very seriously damaged, the defendant made no delivery of even the damaged remains, and offered no explanation whatever why the salvage from the wreck was not so delivered (Transcript, fols. 144, 145, 164, 178, 197).

The complaint pleaded breach of duty by the defendant in four ways (Transcript, fols. 7-19):

- (1) As a breach of the contract to carry safely;
- (2) As a failure to deliver according to contract;
- (3) As negligence;
- (4) As a breach of the duty imposed on the initial carrier by Section 20 of the Interstate Commerce Act, the Carmack Amendment so-called.

The four automobiles and parts constituting the shipment were actually worth \$15,487.06 (Transcript, fol. 68). The defendant knew the nature of the shipment (Transcript, fols. 85, 86) and had a complete list of the articles composing it (Transcript, fols. 76, 77). This list was embodied in the bill of lading itself. The defendant expressly stipulated on the trial that it knew at the time of

delivery of said property to it that the same was of value largely in excess of \$1,000.00 (Transcript, fol. 69).

At the time of making the shipment the plaintiff accepted from the defendant the bill of lading covering it and assented to the terms and stipulations of said bill of lading, including the following:

"Nor shall said company" (Wells, Fargo & Company)" be liable for any loss of or damage to said property in any event or for any cause whatever unless said loss or damage shall be proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants; nor in any event shall said company be held liable beyond the sum of Fifty Dollars, at not exceeding which sum the said property is hereby valued, unless a different value is herein above stated;"

* * * * *

"Value asked and not declared."

When a different value is declared, it is stated on the face of this same bill of lading, and by the terms thereof, the carrier thereby becomes liable only for loss or damage proved to have been caused by or to have resulted from the fraud or gross negligence of said company or its servants.

No agreement was ever made as to the rate to be paid for the carriage of the shipment (Transcript, fols. 89, 79-130).

The answer of the defendant set up as a defense to each cause of action said limitation of liability to \$50.00. All other defenses were waived at the trial.

The case proceeded to trial before Judge Holt, District Judge of the Southern District of New York, holding a term of court in the Western District of New York, and a jury.

Upon the trial facts were proved from which the jury could have found that the damage to the shipment was due to the gross negligence of the Atchison, Topeka & Santa Fe Railway Company, which was transporting the shipment for the defendant, and that the salvage remaining after the fire was converted by the defendant and by said Railway Company, without sufficient excuse (Transcript, fols. 135, 241).

At the close of the trial, on motion of the defendant (Transcript, fols. 242, 243), the Trial Court directed a verdict against the defendant for \$50.00 and interest, to which exception was duly taken by the plaintiff (Transcript, fols. 258, 259). Judgment was rendered upon the direction of a verdict (Transcript, page 20).

The plaintiff below filed assignments of error (Transcript, page 90), and took its writ of error to the Circuit Court of Appeals for the Second Circuit (Transcript, page 98).

The case came on for hearing at the October Term, 1910, of the said United States Circuit Court of Appeals for the Second Circuit. On the 29th day of May, 1911, judgment of the said Circuit Court of Appeals was filed and entered whereby

the judgment of said Circuit Court was affirmed, Circuit Judges Lacombe and Ward concurring and Circuit Judge Noyes dissenting. The prevailing opinion of Circuit Judge Ward is found in Transcript, page *102 and the dissenting opinion of the Circuit Judge Noyes found in Transcript, page *109.

Your petitioner respectfully represents that it should have a writ of review by certiorari for the following reasons:

I.

That the Circuit Court of Appeals by its judgment affirms the judgment of the Circuit Court and adjudges that the defendant in error recover from plaintiff in error its costs and have execution therefor.

II.

That your petitioner has not the right by appeal or writ of certiorari to cause the judgment of the said Circuit Court of Appeals to be reviewed or corrected in this Court.

III.

That the decision and judgment of the United States Circuit Court of Appeals of the Second Circuit varies and differs in its conclusions as to the law governing the questions involved in this case from the conclusions of the Interstate Commerce Commission in the *Matter of Released Rates*, 13 Int. Com. Rep., 550. That under the

Interstate Commerce Law the Interstate Commerce Commission has the right to make administrative rules for the conduct of the business of common carriers, subject to federal jurisdiction. Furthermore, the Interstate Commerce Commission is empowered by the Act to Regulate Commerce, Act of February 4, 1887, Chap. 104, to enforce compliance with the provisions of said Acts, including Section 20 aforesaid, and appropriations have been made in the recent sundry civil appropriation acts to enable the Commission to enforce compliance with Section 20. See Act of March 4, 1909, Chap. 299, Sec. 1, 35 Stat. at L. 965. In pursuance of said duty, the Commission has held in the decision cited above that it is against public policy and contrary to Section 10 and Section 20 for common carriers to agree with shippers upon a known gross under-valuation, so as to reduce the rate and exempt the carrier from liability for his negligence. The Interstate Commerce Commission in its decision distinguishes a decision of the Supreme Court in *Hart vs. Pennsylvania Railroad Company*, 112 U. S., 331, on the ground the sum of \$200. each at which twelve race horses were agreed to be valued was a reasonable valuation of property of that species, and not an arbitrary and gross under-valuation, amounting to an exemption from liability for negligence. The Interstate Commerce Commission also held in Conference Rulings of the Commission, published in 1910, page 14, No. 58, that a shipper may not lawfully declare a value of \$5,000. upon a package of negotiable bonds of the market value of \$10,000.

and pay the express charges on the basis of the declared value, upon the understanding that in case of the loss of the bonds the express company will be responsible only for the amount so declared. These decisions of the Interstate Commerce Commission have been largely followed by shippers and carriers, but now it has been held by said Circuit Court of Appeals that they are wrong, and that a carrier may by a guise or fiction of a valuation exempt itself from liability, except for a nominal sum, in case of loss caused by its negligence or wrong.

IV.

That the decision and judgment of the United States Circuit Court of Appeals of the Second Circuit also varies and differs from the conclusions of the United States Circuit Court for the First Circuit in *The New England*, 110 Fed., 415, in which Judge Lowell held that by the mere form or fiction of an agreed valuation an exemption from liability cannot be sustained which would be invalid without such form of words.—“To make a case turn on the presence or absence of the formal words ‘at which the package is hereby valued’ is to sacrifice substance to form.”

V.

That the judgment of the majority of the Judges below rests upon an erroneous conception of the decision of this Court in *Hart vs. Pennsylvania Railroad Company*, 112 U. S., 331, which it is of

great public interest to have corrected by this Court. That common carriers and shippers generally are at a loss to know whether the interpretation of the *Hart* case by the Interstate Commerce Commission or the interpretation by said United States Circuit Court of Appeals is correct. As stated in the dissenting opinion of Judge Noyes below:

"There was not in the *Hart* case a fictitious 'valuation'—an arbitrary sum having no relation whatever to the real value of the property. The valuation in the receipt of \$200 was undoubtedly a fair average valuation of a horse, and race horses which probably more than any other class of property are susceptible of 'extravagant and fanciful valuations'—were shipped under it. The Supreme Court apparently held the valuation *bona fide* and sustained it for that reason."

And again:

"While public policy declares that agreements which relieve a carrier from the effects of its negligence 'are contrary to the fundamental principles upon which the law of carriers was established' nevertheless such exemption may be obtained by going through a form of words—by 'valuing' the most valuable article at a penny!"

The questions sought by your petitioner to be reviewed in this proceeding are:

1. Whether or not a common carrier may agree with the shipper for a practical exemption from liability for its negligence under the known fiction of an agreed valuation.

2. Whether the sole alternative offered upon payment of an additional rate, of liability for the gross negligence only of the carrier, or its servants, was a reasonable alternative within the ruling of this Court in *The Kensington*, 183 U. S., 263.

3. Whether this bill of lading did not provide for an exemption within the prohibition of Section 20 of the Interstate Commerce Act.

4. Whether this bill of lading did not contain a false billing whereby the shipper would obtain transportation for property at less than the regular rates within the prohibition of Section 10 of the Interstate Commerce Act.

Your petitioner further respectfully represents that while the amount involved on the face of the pleadings in this case is about \$15,000., yet the principle involved is one of great importance to society. That upon the decision of this case will depend, to a large extent, the methods of business of common carriers throughout the United States. That the whole fabric of decision in this Court holding that exemptions from liability for negligence are against public policy is rendered a delusion and a sham, if such public policy can be so easily satisfied by the fiction of an agreed valuation known to both carrier and shipper to be merely nominal.

That the questions involved in this suit are novel, and none of such questions have been passed upon by this Court directly, so far as your peti-

tioner is advised. That there has been a conflict of decisions among the Circuit Courts and the Interstate Commerce Commission in regard to the scope and extent of the decision of this Court in *Hart vs. Pennsylvania Railroad Company*. That if the Circuit Court of Appeals was right in its interpretation of the *Hart* case, then the many cases previously decided by this Court, holding that a common carrier may not exempt itself from liability for negligence, were practically overruled by the *Hart* case, since it was made so easy to avoid their effect by a mere form of words; notwithstanding this Court stated in the *Hart* case that the former decisions were not overruled thereby, and said decisions have been frequently followed since the *Hart* case.

That the case is one for the exercise of the discretion of this Honorable Court in granting a writ of certiorari.

Your petitioner has prepared and presents herewith a brief in which the questions suggested in this petition have been discussed more fully than was possible in the petition, and they pray that the Court will refer to the same and take and consider it as a part of this petition.

WHEREFORE, in view of the premises, petitioner prays that this Honorable Court will grant its writ of certiorari, directed to the Circuit Court of Appeals for the Second Circuit, requiring that the record of said cause in the said Court, and its decree, be certified to this Court, and that this Honorable Court will thereupon proceed to correct the

errors complained of, reverse the said decree and remand the said cause, and give to your petitioner such other and further relief as the nature of the case may require and to the Court may seem proper in the premises.

THE GEORGE N. PIERCE COMPANY,

By WILLIAM B. HOYT,
GEORGE E. HAMILTON,
JOHN W. YERKES,
JOHN J. HAMILTON,
Attorneys for Petitioner.

Certificate of Counsel.

The undersigned members of the Bar of this Honorable Court, and of counsel for the petitioner, hereby certify that they have examined the foregoing petition and that in their opinion the same is well founded, and they respectfully submit that the cause is one in which the prayer of the petitioner should be granted by the Court.

GEORGE E. HAMILTON,
JOHN W. YERKES,
JOHN J. HAMILTON,
Of Counsel for Petitioner.

**BRIEF IN SUPPORT OF APPLICATION FOR
WRIT OF CERTIORARI.**

The very full statement of this cause contained in the petition obviates the necessity for reciting it in a brief, and the very full consideration given to the question involved in the Circuit Court of Appeals in the opinions rendered upon the writ of error to that Court in a large measure obviates the necessity of entering into an extended argument upon the questions of law involved herein.

We desire simply to state the principles of law respecting the validity of the contracts of common carriage limiting the common law liability which have been established by the decisions of this Court.

I.

A contract which, fairly construed, substantially exempts a carrier from liability for his negligence, is void, notwithstanding a shipper may obtain a contract for full liability upon payment of an additional charge for valuation.

Calderon vs. Atlas Steamship Company,
170 U. S., 272.

The bill of lading in the *Calderon* case provided as stated above,

“It is also mutually agreed that the carrier shall not be liable * * * for goods of any description which are above the value of \$100. per package, unless bills of lading are signed therefor, with a value therein expressed, and a special agreement is made.”

It was sought to bring the case within the decisions of the Court in

N. Y. C. & H. R. R. Co. vs. Fraloff,
100 U. S., 24, and

Hart vs. Pennsylvania R. R. Co., 112 U.
S., 331.

The Court held, however, that in spite of the alternative offered the limitation was void as an attempt of the carrier to exonerate itself from all responsibility for goods exceeding the value of \$100 per package. The Court said:

“The difficulty is not removed by the fact that the carrier may render itself liable for these goods, if ‘bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.’ This would enable the carrier to do as was done in this case—give a bill of lading in which no value was expressed, under which it would not be liable at all for the safe transportation and proper delivery of the property. This would be in direct contravention of the Harter Act. Indeed, we understand it to be practically conceded that under the construction we have given to this clause of the contract the exemption would be unreasonable and invalid.”

II.

In determining this case the Courts of the United States are not bound by the law of the Courts of the State where the case was tried or where a contract was made, or where a contract was to be performed, but may decide the question of public pol-

icy involved, according to the principles of law established by the Federal Courts.

Railroad Company vs. Lockwood, 17 Wall., 357.

Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.

Liverpool and Great Western Steamship Co. vs. Phoenix Ins. Co., 129 U. S., 397.

Same vs. Insurance Company of North America, 129 U. S., 464.

The Majestic, 166 U. S., 375.

C., M. & St. P. Ry. Co. vs. Solan, 169 U. S., 133.

Calderon vs. Steamship Co., 170 U. S., 272.

B. & O. S. R. Co. vs. Voigt, 176 U. S., 498.

The Kensington, 183 U. S., 263.

III.

The ruling principle is stated by the Supreme Court in *Baltimore & Ohio S. R. R. Co. vs. Voigt*, 176 U. S., 498 as follows:

"1. That exemptions claimed by carriers must be reasonable and just, otherwise, they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability, for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable or just, but as contrary to a sound public policy, and therefore invalid."

See also cases cited.

IV.

"Where a contract * * * is fairly made agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by negligence of the carrier, the contract will be upheld as a proper and lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

Hart vs. Railroad Company, 112 U. S., 331.

V.

If, however, the offer made by the carrier to transport the property at an agreed valuation thereof was not accompanied by an offer to carry free from any limitation of liability upon payment of a higher freight rate, the agreed valuation is not binding.

The Kensington, 186 U. S., 263.

Calderon vs. Atlas Steamship Co., 170 U. S., 272.

In the case at bar the carrier would not agree under any circumstances, even the payment of a higher freight rate, to be liable except for its fraud or gross negligence. Under no circumstances did it offer upon payment of a higher freight rate, to be liable for its ordinary negligence.

It is true that in *Railway Company vs. Arms*, 91 U. S., 489, this Court held that there is no distinction between gross and ordinary negligence. That was a case where it was sought to have the Court make such a distinction as a matter of substantive law. The Court properly refused to lay down any such rule of liability in that case, depending upon the difference between gross and ordinary negligence. In the case at bar the carrier has chosen its own words with the evident intention that they shall not be meaningless but meaningful. If the stipulation be valid it is the duty of the Courts to give effect to the contract of the parties and to make a distinction between gross and ordinary negligence.

In a case where a telegraph blank limited liability to proved fraud or gross negligence, the Court of Appeals of New York said:

"However occurring, if by no wilful misconduct, a mere mistake, or error, in the transmission of a message would not warrant a jury in finding that there had been MORE THAN ORDINARY NEGLIGENCE (see *Breese vs. U. S. Tel. Co.*, 48 N. Y., 132; *Primrose vs. W. U. Tel. Co.*, 154 U. S., 1)."

Halsted vs. Postal Telegraph Cable Co.,
193 N. Y., 293, 300.

VI.

Although a so-called agreed valuation was stated in the bill of lading, it was so disproportionate to the true valuation as to be merely a nominal sum,

and therefore practically an exemption from liability.

The actual and obvious value of the shipment was over \$15,000.00. The so-called agreed valuation, Fifty Dollars, less than three-tenths of one per cent., was so small as to be merely a nominal sum. As suggested by Judge Noyes dissenting below, if this can be sustained as a valuation, then the valuation of the most valuable article at a penny could also be sustained.

The conception "a nominal sum," "a nominal consideration" or "nominal damages" is familiar to the courts. Black's Law Dictionary thus defines "a nominal consideration":

"A nominal consideration is one bearing no relation to the real value of the contract or article, as where a parcel of land is described in a deed as being sold for One Dollar, no actual consideration passing or the real consideration being concealed."

It is well settled that a purely nominal consideration will not sustain an executory contract, and is in fact, no consideration at all.

VII.

Hart vs. Pennsylvania Railroad Company, 112 U. S., 331, involved the *bona fide* valuation of articles of most uncertain worth, race horses, at a fair average valuation of horses, \$200.00 each.

In the case at bar automobiles which are of a definite and ascertainable market value, were valued at less than \$12.50 a piece. The so-called valuation was known to be a fiction and a pretense.

The *Hart* case has been distinguished as not applicable under such facts in the following decisions:

Matter of Released Rates, 13 Interstate Commerce Reports, 550.

In this case the Interstate Commerce Commission said:

“We are aware that the distinctions which are here drawn have not been invariably recognized, but it is believed that this has been due to a misconception of the real scope of the decision in *Hart vs. Pennsylvania R. R. Co.* Careful study of the opinion of the Court and of the cases which are cited in support of the decision must lead inevitably to the conclusion that the principle does not extend beyond the case where the ‘agreed valuation’ is *bona fide*. It cannot apply where the valuation is purely fictitious. To hold otherwise would mean a departure from principles which the Supreme Court has maintained with unvarying consistency.”

See also cases cited by the Interstate Commerce Commission and:

Western Railway Co. vs. Harwell, 91 Ala., 340; 8 So., 62.

Georgia Pacific Ry. vs. Hughart, 90 Ala., 36; 8 So., 62.

Hanson vs. Great Northern R. R. Co., 18 N. Dak., ; 121 N. W., 78.

Ullman vs. C. & N. W. Ry. Co., 112 Wis., 150; 88 N. W., 41.

Murphy vs. Wells, Fargo & Co., 99 Minn., 231.

Simpson vs. Railway Co., 30 Kan., 645.

Kellerman vs. Railway Co., 136 Mo., 177.

Railway Co. vs. Beasley, 104 Va., 788; 52 S. E., 566.

Schwarzschild vs. National S. S. Co., 74 Fed., 257.

VIII.

Exemption from liability in a bill of lading was prohibited by the Carmack Amendment to Section 20 of the Interstate Commerce Law. (Act of June 29, 1906, Chap. 3591, Sec. 7, 34 Stat. at L., 593.)

The statute reads as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor *and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it*, or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, *and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed*: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

In so far as the provisions of the statute prohibit exemptions from liability for loss caused by the carrier issuing the bill of lading itself and not by a connecting carrier, it is probably declaratory of the common law.

The public and statutory policy of the United States should be enforced; it should not be permitted to be defeated by a mere form of words importing a valuation at a purely nominal sum.

IX.

The limitation of liability in the bill of lading was prohibited by the Interstate Commerce Act, as a concession to the shipper, or variation from the posted and filed schedules of rates and charges of the defendant. The declaration of a false valuation is a violation of Section 10 of the Act.

In so far as the defendant's rates and charges can be gleaned from the evidence, they contemplate the charging of a rate according to valuation. If there is valuation above fifty dollars, an additional charge is to be made. The actual valuation of the shipment was not declared by the shipper, but the carrier could have easily ascertained the true valuation.

By means of deliberate undervaluations, may a shipper obtain a lower rate than that which the real value of the shipment and proper care in its transportation demand?

By the Interstate Commerce Act, "any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce * * * whereby any such

property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier * * * or whereby any other advantage is given or discrimination is practiced," is made illegal (Act of February 19, 1903, Chap. 708, §1, as amended by Act of June 29, 1906, Chap. 3591, 34 Stat. at L. 584).

It is further provided by Section 10 of the original Interstate Commerce Act (Act of February 4, 1887, Chap. 104, 24 Stat. at L. 382; Act of March 2, 1889, Chap. 382, §2, 25 Stat. at L. 357), as follows:

"Any common carrier subject to the provisions of this Act * * * who, *by means of false billing*, false classification, false weighing, or false report of weight, or by any other *device or means*, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be guilty of a misdemeanor * * * ."

X.

The inadvertent statement of the agent of the shipper that the goods were assured does not create an estoppel.

If it be argued that but for this statement the carrier would have protected itself by obtaining insurance, a complete answer is found in the fact that any insurance company protecting the shipper would have been subrogated to the shipper's right of action against the carrier. It was of no concern

to the carrier, therefore, whether the shipper was insured or not.

*Liverpool and Great Western Steamship
Co. vs. Phoenix Ins. Co., 129 U. S., 397.*

The bill of lading contains no provision that any insurance taken by the shipper shall inure to the benefit of the carrier.

XI.

The bill of lading did not in any way limit the liability of the carrier for intentional breach of the contract to deliver. It having appeared that salvage existed after the fire which the carrier failed to deliver, the exact amount of such salvage being known to the carrier but unascertainable by the shipper, the plaintiff should be allowed to recover.

Respectfully submitted,

WILLIAM B. HOYT,
GEORGE E. HAMILTON,
JOHN W. YERKES,
JOHN J. HAMILTON.

Counsel for Petitioner.

Office of the
FILED
OCT 9 1911
U.S. DEPT. OF JUSTICE

RECEIVED

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

U.S. DEPT. OF JUSTICE

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE GEORGE N. PIERCE COMPANY,
Petitioner,

against

WELLS FARGO & COMPANY,
Respondent.

Memorandum in Opposition to Application for Writ of Certiorari.

This Court has said of its power in *certiorari* that:

“It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.”

Forsyth *v.* Hammond, 166 U. S., 506, 514.

There is nothing in the present case, we submit, to call for the exercise of the power.

No public question “affecting the interests of this nation in its internal or external relations” is involved.

There is no “conflict between two or more Courts of

Appeal, or between Courts of Appeal and the courts of a State." The only alleged conflict is with a decision of District Judge Lowell in the District of Massachusetts (*The New England*, 110 Fed. Rep., 415), and with a mere expression of opinion or "administrative interpretation" by the Interstate Commerce Commission (*In the Matter of Released Rates*, 13 Interstate Commerce Reports, 550). The Interstate Commerce Commission is not before this Court asking that the decision below be reviewed.

Nor does the case involve any other question of such importance as to demand the granting of the writ.

The alleged question of false billing under Section 10 of the Interstate Commerce Act is disposed of in a word in the opinion below, and does not appear to be seriously urged.

The question whether the bill of lading did not provide for an exemption within the prohibition of Section 20 of the Interstate Commerce Act was apparently not deemed of sufficient importance by the courts below to require mention. It would seem to be disposed of by the cases holding that the effect of Section 20 is to hold the initial carrier "as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents" (*Atlantic Coast Line v. Riverside Mills*, 219 U. S., 186, 196), and that it does not abrogate the right of a common carrier to agree with the shipper upon a valuation of the property carried.

Greenwald v. Barrett, 199 N. Y., 170;
Bernard v. Adams Express Co., 205 Mass., 254;
Travis v. Wells Fargo and Company, 79 N. J.,
Law Reports, 83.

The question which petitioner argues at greatest length is, whether a carrier may, under the fiction of an agreed valuation, practically nullify the rule of law and public policy forbidding it to stipulate for exemption from liability for its own negligence. But that question, we submit, is not really involved in this case, and may well be left for decision in some case which presents it squarely. There is no evidence here of any effort or intent on the part of the carrier to evade or nullify the law. The Express Company's charges were based on the valuation put upon the thing carried (Record, fol. 122). To avoid the necessity of "a negotiation and a chaffering" (to use the language of the prevailing opinion) over the value of each article tendered for carriage, the express company had inserted in its printed bill of lading a provision for a valuation of Fifty dollars, unless a different valuation was stated by the shipper and charges were paid accordingly. Taking the nature of the express business into account, this fifty-dollar clause in the printed bill of lading represents a substantial sum and not an attempted evasion or undervaluation (as would be the case with the hypothetical valuation of a penny instanced in Judge Noyes' dissenting opinion). It is matter of common knowledge that in a multitude of instances it probably represents at least

the full value of the article carried. When, as in this case, a shipper with full knowledge deliberately refuses to state a different valuation in order to take advantage of the rate applicable to shipments not specially valued (see Record, fols. 120-122, 130-131), the carrier cannot properly be charged with an attempt to evade the law, merely because it takes the shipper at his word and does not insist upon negotiating or chaffering in an effort to agree upon a higher valuation. What alternative has the carrier in such a case, where the shipper declines to agree upon any valuation other than the one stated in the printed receipt? The carrier cannot refuse to carry the goods. Is it bound to have an *ex parte* appraisal made and then attempt to collect a carrying charge based on the value as thus ascertained and assume the burden in case of contest of making proof of such value? We submit that no principle of public policy demands this, or requires the courts to ignore an agreement as to valuation fairly entered into by the parties for the purpose of fixing the rate and the extent of liability.

The question really involved in this application is whether a particular shipper, who has pecuniarily benefited by a valuation which he deliberately adopted as the measure of the carrier's liability (see Record, fol. 122), shall be permitted to repudiate his agreement and recover against the carrier on a higher valuation. In a case like the present, involving no evidence of any attempt by the carrier to evade the law, there would seem to be but one answer to such a question.

We deem it out of place in this memorandum to enter into any elaborate discussion of the authorities further than to say that the decision of this Court in *Hart v. Pennsylvania Railroad Co.*, 112 U. S., 331, cited at length in the prevailing opinion below, appears to be decisive in favor of respondent's position.

ALEXANDER & GREEN,

Attorneys for Respondent.

CHARLES W. PIERSON,

WILLIAM W. GREEN,

WILLIAM C. PRIME,

Of Counsel.